Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

PETER J. LOEWENSTEIN and
HELEN LOEWENSTEIN,

Petitioners,

v.

CITY OF LAFAYETTE, a Municipality,

Respondent.

**On Petition For A Writ Of Certiorari
To The Court Of Appeal
Of The State Of California,
First Appellate District**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether litigation regarding the erroneous application of a land use regulation which resulted in denial of a development project is simply a "normal" part of the development process so that compensation for a temporary taking was properly denied pursuant to *First English Evangelical Lutheran Church of Glendale vs. County of Los Angeles*, 482 U.S. 304 (1987).

2. Whether a landowner is entitled to just compensation for a temporary taking of his land if a land use regulation as generally applied might be viewed as a part of a reasonable regulatory process, but if, as applied to a specific development project, it actually failed to substantially advance any legitimate government interest.

3. Whether a landowner is entitled to just compensation pursuant to *Lucas vs. South Carolina Coastal Council*, 505 U.S. 1003 (1992), for the temporary deprivation of all economically feasible use of his land due to the erroneous application of land use regulation which effectively prevented access and which precluded utilities services.

LIST OF PARTIES

The Petitioners are Peter G. Loewenstein and his wife, Helen Loewenstein. Petitioners were Plaintiffs in the proceedings at the trial court level before the Contra Costa Superior Court; they were Respondents and Cross-Appellants before the California Court of Appeal, First District, Division One; they were unsuccessful Petitioners for Review before the California Supreme Court.

The City of Lafayette, a Municipality, was the Defendant in proceedings before the Contra Costa Superior Court, the Appellant and Cross-Respondent on appeal before the California Court of Appeal, First District, Division One, and the Respondent before the California Supreme Court.

Amici Curiae, City and County of San Francisco, and the State of California filed Briefs in Support of the City of Lafayette before the California Court of Appeal. More than 50 California Cities joined with the City and County of San Francisco and its Brief filed in support of the City of Lafayette.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a Writ of Certiorari to review the Opinion of the California Court of Appeal, First District, Division One, filed November 13, 2002. The California Supreme Court denied a Petition for Review on February 11, 2003.

The California Court of Appeal principally decided this case on the strength of the State Supreme Court holding in *Landgate Inc. vs. California Coastal Commission*, 17 Cal. 4th 1006 (1998). In *Landgate*, the California Supreme Court held that a legally erroneous decision of a government agency during the development approval process which resulted in delay cannot constitute a temporary taking of property for the reason that litigation challenging the validity of a land use restriction which causes such delay is simply a "normal" part of the development approval process. The wrongful regulatory action taken by the City of Lafayette in denial of Petitioners' development application was found to have been without any support or justification and to have failed to substantially advance any legitimate government interest. Nonetheless, Petitioners' required judicial challenge to regulatory action was held to constitute mere "normal" delay in the regulatory process consistent with the aforesaid *Landgate* holding. Petitioners submit that the California Courts have eviscerated this Court's holdings in *First English Evangelical Lutheran Church of Glendale vs. County of Los Angeles*, 482 U.S. 304 (1987) and *Lucas vs. South Carolina Coastal Council*, 505 U.S. 1003 (1992), all in violation of the Fifth Amendment's just compensation requirements.

In 1999, the Wisconsin Supreme Court addressed this issue of litigation required to correct wrongful regulatory action and "normal" development delay in *Eberle vs. Dane County Bd. of Adjustment*, 595 N.W. 2d 730 (1999). Invited to dispose of this issue in the same fashion as has the California Supreme Court in *Landgate* and the Court of Appeal in the subject case, the Wisconsin Supreme Court specifically rejected the California approach to temporary takings damages. In footnote 25 of its decision, the Wisconsin Supreme Court refused to characterize litigation to correct erroneous regulatory action as simply a "normal" part of the development process and, therefore, made possible an award of just compensation for a temporary taking.

Pursuant to Supreme Court Rule 10(b), the grant of Certiorari in this case would enable this Court to resolve the evident conflict between the California and Wisconsin Supreme Courts. In addition, the grant of Certiorari would enable this Court to clearly and unambiguously define the standards (1) for determining what constitutes "normal" delay in the context of temporary takings jurisprudence, (2) for determining what constitutes a legitimate state interest or what type of connection between regulatory action and state interest satisfies the requirement that the former substantially advance the latter, and (3) for determining what constitutes the deprivation of all economically feasible use of property.

OPINIONS AND ORDERS BELOW

The November 13, 2002, published Opinion of the California Court of Appeal, First Appellate District

(Division One) is reported at 103 Cal. App. 4th 718 and is reprinted in the Appendix at App. 1. The December 10, 2002 Order of the Court of Appeal in which the Petition for Rehearing was denied is reprinted in the Appendix at App. 31.

The California Supreme Court denied a Petition for Review on February 11, 2003. That Order is reprinted in the Appendix at App. 32. Remittitur issued and the case became final on February 18, 2003; the Remittitur is reprinted in the Appendix at App. 33.

The Contra Costa Superior Court issued three Orders, a Statement of Decision, and a Judgment, all of which were unpublished but relevant to this Petition. The Superior Court Order Granting Petition for Writ of Mandate is reprinted in the Appendix at App. 59. The Decision and Order Re Ripeness is reprinted in the Appendix at App 66. The Order Re Tentative Ruling is reprinted in the Appendix at App 68. The Trial Court Statement of Decision and Judgment are reprinted in the Appendix at App. 72 and 98.

Some reference to the administrative proceedings before the City of Lafayette City Council is necessary and relevant to this Petition as the City's improper and erroneous regulatory action formed the basis for all of the judicial proceedings which followed. The City Council of Lafayette adopted Resolution No. 69-98 in which it denied Petitioners' original development application; that Resolution is reprinted in the Appendix at App. 41. Subsequently, the City of Lafayette first refused to correct its erroneous regulatory action in an initial return to a Contra Costa Superior Court Peremptory Writ of Mandate, which initial return is relevant to this Petition and is reprinted in the

Appendix at App. 64. Finally, the City Council reversed its position, in effect conceding that its regulatory action was legally erroneous and approving Petitioners' development project in an Amended Return to Peremptory Writ of Mandate which has been reprinted in the Appendix at App. 103.

JURISDICTION

The Decision of the California Court of Appeal, First Appellate District, Division One, for which this Petition for Writ of Certiorari has been sought was filed by the Clerk of that Court on November 13, 2002. A Petition for Rehearing was denied December 10, 2002. The California Supreme Court denied a Petition for Review in an Order filed February 11, 2003. On February 18, 2003, the Court of Appeal issued a Remittitur and the Decision became final.

From its very inception, this case has presented important questions of constitutional law. The Fifth Amendment to the United States Constitution expressly prohibits the taking of private property without due process of law and payment of just compensation. The Fifth Amendment is made applicable to the States by and under the terms of the Fourteenth Amendment. The Complaint filed with the trial court specifically sought declaratory relief and damages pursuant to the takings clause of the Fifth Amendment. The Court of Appeal reversed a trial court judgment for a regulatory taking based essentially upon the California Supreme Court case, *Landgate Inc. vs. California Coastal Commission*, 17 Cal. 4th 1006 (1998). *Landgate*, in turn, represented the California Supreme Court's implementation of this Court's

decision in *First English Evangelical Lutheran Church of Glendale vs. County of Los Angeles*, 482 U.S. 304 (1987) (which held a landowner may recover just compensation damages for the taking of his property for the period before it is finally determined that the regulation in question worked a temporary taking except in cases involving "normal" delays in obtaining building permits, changes in zoning ordinances, variances, and the like). Thus, jurisdiction exists pursuant to 28 U.S.C. Section 1257.

Because the Court of Appeal opinion made under the authority of the California Supreme Court's *Landgate* decision directly conflicts with a decision of the Wisconsin Supreme Court involving similar issues, and because that opinion decides important questions of constitutional law in a fashion which conflicts with decisions of this Court and/or which should be settled once and for all by this Court, jurisdiction also exists pursuant to Rule 10 of the Supreme Court Rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment V, which provides, in pertinent part, "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The United States Constitution, Amendment XIV, which provides, in pertinent part, " . . . [No State shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The genesis of the dispute which gave rise to this case was Petitioners' application for a lot line adjustment in which they proposed to reconfigure the lot lines of three separate adjoining pre-existing legal parcels. As determined by the trial court, the three subject parcels might have been merged into a single parcel and then resubdivided under the California Subdivision Map Act. A Subdivision Map Act application would clearly have been denied by the City of Lafayette, however. The reconfiguration of lot lines of adjoining parcels is permitted as an exemption from the Subdivision Map Act and little discretion is afforded the City of Lafayette with respect to the approval or denial of such an application. The Petitioners' development permit application was for lot line adjustment of adjoining parcels and the City's denial of that development application was found to have been legally erroneous. The lot line adjustment statute is relevant to these proceedings and is found in California Government Code Section 66412(d). That statute provides as follows:

[The Subdivision Map Act in its entirety is inapplicable to:]

> "(d) A lot line adjustment between four or fewer existing adjoining parcels, where the land taken from one parcel is added to an adjoining parcel, and where a greater number of parcels than originally existed is not thereby created, if the lot line adjustment is approved by the local agency, or advisory agency. A local agency or advisory agency shall limit its review and approval to a determination of whether or not the parcels resulting from the lot line adjustment will conform to the local General Plan, any applicable Coastal Plan, and Zoning and Building Ordinances. An advisory agency or local agency shall not impose

> conditions or exactions on its approval of a lot line adjustment except to conform to the local General Plan, any applicable Coastal Plan and Zoning and Building Ordinances, to require the prepayment of real property taxes prior to the approval of the lot line adjustment, or to facilitate the relocation of existing utilities, infrastructure, or easements. No tentative map, parcel map, or final map shall be required as a condition to the approval of a lot line adjustment. The lot line adjustment shall be reflected in a deed which shall be recorded. No record of survey shall be required for a lot line adjustment unless required by Section 8762 of the Business and Professions Code."

Resolution 69-98 of the Lafayette City Council, which is reprinted in the Appendix at App. 41.

STATEMENT OF THE CASE

A. Statement of Facts

The Petitioners Loewenstein are residents of the City of Lafayette, California (City). The lot on which they built their Lafayette home was created as a part of a 1977 subdivision. At the time that subdivision was approved, the City imposed a condition, without explanation, which precluded further subdivision "of the property". App. 1-2. Years later, the Loewensteins acquired a legal, but nonconforming and very small parcel of real property adjacent to their residential lot (the Tank Lot). This Tank Lot had been declared "surplus" by the East Bay Municipal Utility District (District) as it had at one time housed a water storage tank long since removed. As required by law, the District offered the Tank Lot to the City as a pre-condition

to public sale. The District's analysis of the Tank Lot which accompanied its offer to the City noted that it lacked both access and utilities, such that its independent development was problematic, at best. The City declined to purchase the Tank Lot and recommended instead that the District sell it to an adjoining property owner who could then merge the land or create a more useable lot through a lot line adjustment. App. 57-58.

The entire purpose for the Loewensteins' purchase of the Tank Lot was to use the lot line adjustment procedure to create a more useable lot with access and utilities upon which they might construct a single-family residence. To this end – and in accordance with City recommendations – they proposed a lot line adjustment which would reconfigure the Tank Lot into a conforming developable parcel with utilities and road access which might be improved with a single family residence of a type and size compatible with other homes within the neighborhood. The City denied the Loewenstein lot line adjustment despite the fact that the Loewensteins proposed to do nothing other than what the City's recommendation to the District anticipated. App. 3, 5.

The Tank Lot was adjacent, but not contiguous, to the Loewenstein residential lot. The two lots only share a common corner. Given this logistical circumstance, the Tank Lot, by itself, could neither be merged into the Loewenstein residential lot nor was it feasible to reconfigure the Tank Lot through a lot line adjustment process only involving the residential lot. The Tank Lot and the residential lot were physically separated from sharing a common boundary line (as opposed to a common corner) by land which comprised yet a third lot – a lot owned by adjoining neighbors, the Millers. By adding a triangular portion of the Miller lot to the Tank Lot and Loewenstein

residential lot, sufficient common boundaries existed to merge the lots, resubdivide them, and/or reconfigure them using the lot line adjustment process. The Loewenstein residential lot has public road access and available utilities. Since the residential lot and the Tank Lot share only a common corner with no common boundary line, however, regulatory approval by the City of either a lot line adjustment or a subdivision was required to extend roadway access and utilities to the Tank Lot. App. 4.

The adjoining neighbors who owned the third lot which was a part of the lot line adjustment refused to participate in any fashion in a Subdivision Map Act application. They were concerned over the impact of potential exactions and conditions of approval which the City might impose as a part of the Subdivision Map Act process. App. 4. It was found by the trial court on the preponderance of the evidence that the City would not have approved a Subdivision Map Act application in any case. App. 66. Despite this latter circumstance, the City Council's Resolution which denied the Loewenstein development application took pains to stress that the denial was as to the lot line adjustment process, but that the Loewensteins might seek the same end result if they would merely pursue a tentative subdivision map through the Subdivision Map Act process. App. 41.

The City was well aware of the statutory procedure for lot line adjustments as it acknowledged that hundreds of such applications had been routinely processed over a period of at least 16 years without a single denial save and except the subject Loewenstein application. App. 72, 78, 80. The City's denial of the Loewenstein lot line adjustment application and its urging that the Loewensteins might seek approval of the development project through the Subdivision Map Act process was ingenuous.

Obviously, if the City was prepared to grant the end result sought by the Loewensteins through the Subdivision Map Act process, it might just as well have approved the lot line adjustment. In fact, the trial judge found the City's regulatory action taken in denial of the lot line adjustment application to have been erroneous and without substantial or any evidence in the record to support it. App. 59. The trial judge also found that there was no reasonable probability that a subdivision application would have been approved by the City. App. 66. In the absence of approval of the lot line adjustment application, the Loewensteins were found to have been denied all economically viable use of their land. On the preponderance of the evidence produced at trial, the trial judge also found that the Loewensteins' expectations regarding development of their Tank Lot were reasonable investment-backed expectations which were completely frustrated by the City's regulatory action. App. 72, 79. This was particularly egregious as both the District and the City had anticipated that the ultimate purchaser of the Tank Lot would use precisely the lot line adjustment process selected by the Loewensteins to render the Tank Lot more useable and actually developable given the lack of access or utilities at the time of its purchase. App. 72.

Finally, and importantly, the trial court found that the City had failed to offer any credible evidence of any substantial government purpose which was furthered by its regulatory action of denial of the Loewenstein lot line adjustment application. To the contrary, the trial court found that approval of that development application would have furthered any number of substantial government purposes involved in converting a former legal but nonconforming lot, into a legal and conforming lot, and rendering that lot developable with a home of the size and

quality compatible with the surrounding neighborhood. App. 72, 81.

The trial court initially held the City's denial of the Loewenstein development application to have been erroneous. It issued a peremptory writ of mandate commanding that said denial be set aside and other action taken in light of the Court's decision. App. 59. In its return to the Peremptory Writ, the City declined to reconsider its decision and proposed to appeal the trial court determination. App. 64. After trial and a finding that Petitioners were entitled to damages based on the taking of their property through regulatory action with a correlative award of just compensation damages, the City suddenly abandoned its prior position and filed an Amended Return to the Peremptory Writ of Mandate. App. 103. In the Amended Return, the City reversed its position on the lot line adjustment and approved it. This action on the City's part converted what had been a permanent taking of Petitioners' land into a temporary taking for which just compensation damages might be awarded. It was this issue of the temporary taking which was presented to the Court of Appeal as the trial court was afforded no opportunity to decide either the issue of a temporary taking of Petitioners' land or the amount of damages which might be properly assessed.

B. The Course of the Proceedings Below

After Petitioners fruitlessly exhausted all of their administrative remedies, they sought judicial review of the City's denial of their lot line adjustment application pursuant to California Code of Civil Procedure Section 1094.5. The first of three separate trial judges ruled

conclusively that " . . . whether the standard of review be substantial evidence or arbitrariness, Respondent City of Lafayette's denial has no support in the Administrative Record." A Peremptory Writ of Mandate was issued; however, the City refused to reconsider its prior permit denial. The case then proceeded through several Motions in Limine to trial on the issue as to whether the City's denial of the lot line adjustment application had effected a regulatory taking. In ruling on a Motion in Limine, the original trial judge found on the preponderance of the evidence that " . . . it would be futile for Plaintiffs to proceed with an application under the Subdivision Map Act. Defendants own planning staff has made that clear . . ." and ". . . there is no reasonable possibility that Plaintiffs can develop their landlocked tank site independent of their residential parcel".

Prior to actual trial on the issue of a regulatory taking, the City raised the California Supreme Court Decision in *Landgate Inc. vs. California Coastal Commission*, 17 Cal. 4th 1006 (1998) as bar to any finding that a regulatory taking might have occurred. The principal basis of the City's argument was its contention that the delay attendant upon the need to seek judicial review of the City's erroneous regulatory action was but a part of "normal delay" which might not give rise to "takings" damages. That issue was heard by a second trial judge to whom the case had been assigned and who rendered an Interlocutory Order holding that, on the record presented by the Motion, the City's action was not objectively unreasonable but that " . . . whether or not there has been a taking cannot be determined on the existing record because there are disputed issues of fact." The judge who rendered the Interlocutory Order then recused herself and

the case was assigned for trial on the issue of a takings and the amount of just compensation due, if any.

After a full evidentiary court trial, the trial judge ruled that a regulatory taking had occurred and that Petitioners were entitled to just compensation. In so ruling, the trial judge specifically found (1) the Loewensteins purchased the Tank Lot with reasonable investment-backed expectations that it could be rendered a buildable lot with proper access and available utilities through the lot line adjustment process; (2) the economic impact of the City's regulatory action denied all economically viable use of the property; and (3) the City's regulatory action failed to substantially advance any legitimate state interest and involved the application of an arbitrary standard in direct conflict with the plain language of California Government Code Section 66412(d) and a prior California Court of Appeal case which was held to be directly on point – *San Dieguito Partnership vs. City of San Diego*, 7 Cal. App. 4th 748 (1992). The trial court rendered a Statement of Decision and a Judgment, which Judgment was for the fair market value of the property as a permanent taking.

After Judgment but prior to appeal, the City reversed its position on the lot line adjustment and approved it as presented. This action on the City's part clearly changed the nature of the regulatory taking so that the issue then became whether a temporary taking had occurred for which just compensation was due. Unfortunately, the trial court had filed an Order to reopen the case to determine whether the City's withdrawal of its rejection of the lot line adjustment affected the amount of damages when the statutory time period in which the Court could have ruled

on a new trial motion had run. At that point, the case was in the following procedural posture:

A. The City had belatedly filed an Amended Return to the Peremptory Writ of Mandate which approved the Loewenstein lot line adjustment in compliance with the original trial court ruling on the administrative mandate cause of action. This had the effect of restoring to the Loewensteins their land, as the City then abandoned the course of action which gave rise to just compensation damages for a permanent regulatory taking.

B. The City pursued an appeal on the issue of a temporary regulatory taking. The parties agreed that the City's abandonment of its legal position on which the denial of the lot line adjustment was based rendered the regulatory taking temporary. (*First English Evangelical Lutheran Church of Glendale vs. County of Los Angeles*, 482 U.S. 304, 321 (1987) – after taking occurs, the government retains the option to withdraw an invalidated regulation.) The trial court itself had no occasion to actually consider a ruling on the issue of a temporary taking as the Order purporting to reopen the case to determine whether the change of position had affected the amount of damages was filed beyond the statutory time period in which the court could have ruled on a new trial motion and the motion was therefore denied by operation of law. California Code of Civil Procedure Section 660.

C. The Court of Appeal reviewed the Evidentiary Record amassed at trial and reached its own independent conclusion after its independent review and reweighing of the evidence, that no temporary regulatory taking had occurred, thereby reversing a trial court judge who awarded just compensation for a permanent regulatory

taking. The Court of Appeal gave no deference to the factual findings of the trial court which were supported by substantial evidence and which would have supported an award of damages for a temporary taking under the doctrine of *First English*.

The Opinion of the California Court of Appeal is objectionable on numerous bases. In part, it is certainly the case that the Court of Appeal chose to independently review the record and make its own factual findings in derogation of the well known rule which requires appellate courts to defer to trial courts on factual issues so long as such factual issues are supported by substantial evidence in the trial court record. Nonetheless, the Petitioners have not sought review in this Court simply to rectify a manifest injustice based upon application of an improper standard for appellate review of factual findings. Instead, Petitioners seek this Court's review because that decision effectively eliminates temporary takings damages in California by virtue of its conclusion that essentially any erroneous regulatory action requiring judicial review and challenge is simply non-compensable "normal" delay encountered as part of the regulatory process. The Court of Appeal Decision conflicts with this Court's opinions in *First English* and *Lucas vs. South Carolina*, 505 U.S. 1003 (1992), which makes available to an aggrieved landowner just compensation damages for a temporary taking of his land. Further, the Court of Appeal Decision conflicts with this Court's holding in *Agins vs. City of Tiburon*, 447 U.S. 255 (1980) and *Nollan vs. California Coastal Commission*, 483 U.S. 825 (1987), in which it was expressly held that the failure of regulatory action to substantially advance legitimate government interests might, in and of itself, cause a taking for which just compensation damages are recoverable.

Finally, the Court of Appeal Decision is in direct conflict with a recent opinion of the Wisconsin Supreme Court in which the latter court simply declined to follow California's *Landgate* rule, as it specifically held that a judicial challenge to administrative regulation is not a "normal part" of the regulatory process.

REASONS FOR GRANTING THE WRIT

A. THE HOLDING OF THE CALIFORNIA COURT OF APPEAL THAT LITIGATION REGARDING THE ERRONEOUS APPLICATION OF A LAND USE REGULATION WHICH RESULTED IN DENIAL OF A DEVELOPMENT PROJECT IS SIMPLY A "NORMAL" PART OF THE DEVELOPMENT PROCESS REQUIRING NO COMPENSATION DIRECTLY CONFLICTS WITH THE FIFTH AMENDMENT AND ITS REQUIREMENT FOR PAYMENT OF JUST COMPENSATION FOR A REGULATORY TAKING AS SET FORTH IN *FIRST ENGLISH*

In *Agins vs. City of Tiburon*, 447 U.S. 255 (1980) (*Agins*), this Court acknowledged that the application of a General Zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner the economically viable use of his land. The California Supreme Court had previously determined that the landowner could not recover damages for inverse condemnation even if zoning ordinances as applied to the land had constituted a taking. That court had held that only mandamus and declaratory relief were remedies available to such a landowner. (*Agins*

vs. City of Tiburon, 24 Cal. 3d 266 (1979)). In *Agins,* this Court concluded that no taking had occurred and, therefore, " . . . we need not consider whether a state may limit the remedies available to a person whose land has been taken without just compensation." *Id.* @ 263.

In *First English Evangelical Lutheran Church of Glendale vs. County of Los Angeles*, 482 U.S. 304 (1987) (*First English)*, this Court addressed the remedial question which was left unanswered in *Agins,* due to concerns over finality. This Court noted that the California Supreme Court may not have actually disavowed its general rule in *Agins,* but it had truncated that rule by disallowing damages that occurred prior to the ultimate invalidation of a challenged regulation. Therefore, this Court held that where government activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide just compensation for the period during which the taking was effective. The opinion in *First English* then added an important disclaimer: The decision was limited to the facts presented and did not deal with the quite different questions that would arise in the case of "normal delays" in obtaining building permits, changes in zoning ordinances, variances, and the like. *Id.* @ 321.

In *Landgate Inc. vs. California Coastal Commission*, 17 Cal. 4th 1006 (1998), (*Landgate*) the California Supreme Court gave lip service to *First English* and its holding that a temporary taking of property due to invalid regulation might be compensable. In fact, the California Supreme Court acknowledged that its own decision in *Agins* had been repudiated by *First English*. Nonetheless, the majority of the Supreme Court in *Landgate*, concluded

that the mistaken assertion of jurisdiction over development is part of the development approval process and delays that result by reason of judicial review may be imposed without a just compensation obligation. In effect, *Landgate* represents a return by the California Supreme Court to its *Agins* doctrine prior to issuance of this Court's *First English* opinion, as *Landgate* held that judicial challenges to wrongful regulatory action were merely a "normal" part of the regulatory process. *Landgate* did acknowledge an extremely narrow exception to the foregoing rule in apparent deference to *First English*: If a regulatory position was so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it, a temporary taking might be deemed to have occurred since such a delaying tactic would not advance any valid government objective.

In his dissent in *First English*, Justice Stevens argued unsuccessfully that "Litigation challenging the validity of a land use restriction gives rise to a delay which is just as 'normal' as an administrative procedure seeking a variance or an approval of a controversial plan." See *First English*, 482 U.S. @ 334-335.

In dissent of the majority's opinion in *Landgate*, Justice Chin contended that "[w]hen a regulatory agency prohibits all use of a particular property, and the property owner is forced to sue the agency to get it to change its position, its stonewalling is not fairly characterized as a 'normal delay' in the permit approval process." See *Landgate*, 17 Cal. 4th at 1205. Justice Brown also dissented and concluded that when wrongful assertions of jurisdiction that leave property economically valueless "can be converted into 'the recognition that a judicial determination of

the validity of certain preconditions to development is a normal part of the development process,' then, in California, at least for now, *Lucas* is a dead letter." See *Landgate*, 17 Cal. 4th at 1043.

The California Supreme Court majority opinion in *Landgate,* and the Court of Appeal in this case, have used the "normalcy" standard announced in *First English* to reject the majority opinion of that case and to adopt the position of Justice Stevens in dissent. It was Justice Stevens who argued that wrongful regulatory action requiring judicial intervention was but part of the regulatory process for which delay was "normal" and to be expected. The *Landgate* majority did slightly modify the Stevens dissent in a nod to this Court's majority opinion by holding that an agency's legal position might be so transparently unreasonable that it must be deemed to have been adopted solely for purposes of delay. As the application of *Landgate* to this case indicates, however, that exception is more imaginary than real. *Landgate* actually represents a return to California law as it existed prior to this Court's *Agins* opinion, and both *Landgate* and this case directly conflict with *First English*.

In this case, the City and the District which sold the Loewensteins the subject Tank Lot both anticipated that said lot might be rendered developable through reconfiguration with adjoining lots pursuant to California's lot line adjustment statute (Government Code Section 66412(d)). The Tank Lot was only offered to adjoining landowners in recognition of this circumstance. It was concededly a legal, pre-existing parcel so that subdivision was not involved in any way, shape or form. Despite the straight-forward language of Government Code Section 66412(d) and its own prior expectations, the City took the position that the lot line adjustment sought by the Loewensteins was

inappropriate and that a development application clearly exempt from the Subdivision Map Act process should somehow be reviewed as though it was a subdivision.

Two trial court judges found the City's legal position to be utterly unjustified, foreclosed by statute and case law. Nonetheless, on this same record, the California Court of Appeal characterized the assertion of wrongful regulatory jurisdiction as nothing more than "an honest difference of opinion" requiring litigation over threshold issues which might not be "transform[ed] . . . into a compensable taking." *Loewenstein vs. City of Lafayette*, 103 Cal. App. 4th 718, 736 (2002). If the facts of this case are insufficient to qualify it for the narrow exception to *Landgate's* "normalcy" rule then *First English* is a "dead letter" in California as temporary takings damages simply may not be recovered whenever delays are encountered due to wrongful regulatory action.

The majority opinion in *First English* specifically rejected the proposition that litigation over a wrongful regulatory action was a normal part of the development process in much the same fashion as building permits, variances and zoning ordinances. As is evident in this case, the California Courts have elected to misconstrue and misapply the normalcy standard announced by Chief Justice Rehnquist. As decided, this case directly conflicts with the holding of *First English*, which would not excuse wrongful regulatory decisions requiring judicial intervention as merely "normal delay".

The California Courts have been intransigent in their refusal to follow *First English* and its requirement for payment of just compensation in the event of a regulatory taking. This case offers this Court the opportunity to not merely resolve the conflict of California decisions with the

Court's opinion in *First English*, but also to better define those circumstances which might truly be regarded as "normal delays" requiring no compensation.

The protection of property ownership is a fundamental theme in American constitutional thought. This case affords this Court the opportunity to clarify its prior pronouncements regarding temporary takings jurisprudence and to correct an unconstitutional State Court decision.

B. THE COURT OF APPEAL DECISION WHICH HOLDS LITIGATION OVER WRONGFUL REGULATORY ACTION TO BE BUT A NORMAL PART OF THE REGULATORY PROCESS CONFLICTS WITH DECISIONS OF THE WISCONSIN SUPREME COURT

The Wisconsin Supreme Court decided *Eberle vs. Dane County Bd. of Adjustment*, 595 N.W. 2d 730 (1999), shortly after the California Supreme Court decision in *Landgate*. The issue was whether or not the Eberles had successfully stated a valid claim for a temporary regulatory taking under the Wisconsin and United States Constitutions. The Eberles had unsuccessfully pursued an application for a special exceptions permit so that they might build a driveway access to their land. The denial of that permit by the local agency had the effect of cutting off all access. The Court held that a complete lack of legal access to land constituted a deprivation of all economically feasible use. As the Court observed, "The Eberles could hardly be expected to parachute onto their property in order to use it." *Id.* @ 740. The Wisconsin Supreme Court construed *First English* as requiring just compensation for a temporary taking in the event judicial action is required to overturn a wrongful regulatory decision which had the

effect of depriving a landowner the economically feasible use of his land.

In Footnote 25 of its decision, the Wisconsin Supreme Court noted that it had been urged to adopt the reasoning of the majority opinion in *Landgate*. It declined to do so. The Wisconsin Supreme Court pointed out that the argument of the majority in *Landgate* was clearly considered and rejected by this Court in *First English*, since Justice Stevens made the same argument as did the *Landgate* majority in his dissenting opinion in *First English*. The Wisconsin Supreme Court felt that the eventual receipt of permit approval might not convert an actual taking into a mere delay.

The Wisconsin and California Supreme Courts have each construed and applied the *First English* normalcy standard and temporary takings doctrine in conflicting fashion. Only this Court can resolve that conflict and clarify the constitutional question regarding the necessity for just compensation when wrongful regulatory action requires judicial intervention.

C. THE DECISION OF THE COURT OF APPEAL CONFLICTS WITH THIS COURT'S OPINIONS IN *AGINS* AND *NOLLAN* IN ITS HOLDING THAT A PARTICULAR LAND USE REGULATION WHICH IS A PART OF A REASONABLE REGULATORY PROCESS CANNOT BE DEEMED TO HAVE FAILED TO SUBSTANTIALLY ADVANCE LEGITIMATE GOVERNMENT INTERESTS AS APPLIED

In *Agins*, 447 U.S. @ 260, this Court stated that the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests

or denies an owner economically viable use of his land." In *Nollan vs. California Coastal Commission*, 483 U.S. 825 (1987) (*Nollan*), this Court held that a use restriction may constitute a taking if it is not reasonably necessary to effect a substantial government purpose. This Court further noted that its cases have not elaborated on the standards for determining what constitutes a legitimate state interest or what type of connection between the regulation and the state interest satisfies the requirement that the former substantially advance the latter. A legitimate state interest which is substantially advanced by regulatory action compels a finding that imposition of the regulation does not require payment to the landowner of just compensation so long as it does not deny use of the property in such drastic fashion as to constitute a taking. This "substantially advance" standard requires stricter scrutiny than simply asking if the government rationally decided the matter. This Court noted that it viewed the Fifth Amendment property clause to be more than a pleading requirement and compliance with it to be more than an exercise in cleverness and imagination. The condition for abridgement of property rights requires a substantial advancement of legitimate state interests.

This essential nexus between legitimate state interest and government regulation required by *Nollan* is utterly missing in this case. The creative and speculative justifications advanced by the Court of Appeal in support of the City's regulatory action in denial of the Loewenstein Lot Line Adjustment Application utterly conflict with *Nollan* in that there were no objectively identifiable legitimate government interests which were advanced by the City's wrongful regulatory action. A grant of Certiorari will afford this Court the opportunity to elaborate on the standards for determining what constitutes a legitimate

state interest and for correcting a decision which conflicts directly with *Agins* and *Nollan*.

After a full evidentiary hearing in this case, the trial court concluded that the City's denial of the Loewenstein Lot Line Adjustment Application failed to advance *any* legitimate state interest. That decision was certainly based in part upon the lack of credibility the trial court attributed to the City's principal witness and the fact that the City routinely processed hundreds of lot line adjustment applications while denying only the Loewenstein application. On the other hand, the trial court noted that many legitimate state interests, including, but not limited to, the conversion of non-conforming lots into conforming lots and rendering lots sufficient in size to accommodate development compatible with the surrounding neighborhood, would actually have been substantially advanced had the City approved the Lot Line Adjustment Application.

The Court of Appeal isolated the entire inquiry regarding the legitimate government interest which the City allegedly sought to further by means of denial of the Loewenstein lot line adjustment to the reasons given for rejecting that application expressed in City Resolution 69-98. As set forth therein, the City's alleged legitimate government interests were based on concerns that the reduced area of the new parcel after lot line adjustment would fail to conform to minimum lot size requirements for hillside lots and that the application created a fifth lot in a duly restricted subdivision with improvements and utilities designed for four lots.

The Court of Appeal conceded that the City incorrectly maintained that lot size requirements for subdivision applied as well to existing hillside lots which were merely

to be reconfigured by lot line adjustment; however, the monitoring of hillside slope density requirements for subdivisions were still held to be matters of legitimate government interest even if erroneously applied. The Court of Appeal also held that the prohibition against further subdivision imposed by the City in 1977 as a part of subdivision map approval was a legitimate exercise of government policy and regulatory authority.

The problem with the Court of Appeal decision and its approval of so-called legitimate government interests furthered by the City's action in this case is that the concerns for hillside lots and the prohibition against further subdivision may have been reasonable or even permitted as a matter of general zoning law; however, those concerns as applied simply lacked any "essential nexus" to the City's regulatory action which denied the Loewenstein Lot Line Adjustment Application.

The entire record of proceedings in this case makes clear that all three of the lots involved in the Loewenstein lot line adjustment fully conformed with all building and zoning ordinances after reconfiguration through lot line adjustment – *but not before*. If hillside property required particular oversight (as suggested by the Court of Appeal) then, objectively, the City should have approved – rather than denied – the lot line adjustment. Both the Court of Appeal and the City Resolution voiced concerns that the reduced area of the reconfigured parcels would fail to conform with requirements for hillside lots. The only evidence in the record unequivocally demonstrates, however, that alleged legitimate government interests regarding lot size requirements for hillside lots could only be substantially advanced by approval of the Loewenstein lot line adjustment – as opposed to its denial. This is because the Tank Lot prior to lot line adjustment was only

approximately twenty percent of the land area required by the City to conform with the zoning district and only five percent of the required land area for a hillside lot subject to slope density regulation. After lot line adjustment, the Tank Lot was substantially larger than required by the zoning district and sufficient in size to meet hillside slope density requirements (which were not applicable in any case).

Finally, the City's Resolution and the Court of Appeal both cited concerns that approval of the lot line adjustment would create a fifth lot "in a duly restricted subdivision with improvements and utilities designed for four lots." *Loewenstein vs. City of Lafayette*, 103 Cal. App. 4th 718 @ 732 (2002). No evidence exists anywhere within the entire record of proceedings to the effect that the 1977 subdivision improvements made to adjoining property might somehow be overburdened by the requirements for access and utilities for a fifth lot. Moreover the Tank Lot was a valid legal lot which might be developed if the absence of access and utilities was overcome. Therefore, denial of the lot line adjustment had no objective bearing on this supposed legitimate government interest in avoiding the "creation" of a fifth lot in a restricted subdivision.

The Court of Appeal did not quarrel with the evidence or trial court finding that approval of the Loewenstein lot line adjustment would have actually furthered a number of important and legitimate planning interests. That the City's expressed concerns might have been reasonable and might have even involved legitimate government interests in the abstract is of no avail if the essential nexus between regulatory action and those so-called legitimate government interests and concerns is lacking as applied. That the Court of Appeal's attempt to conform its decision to the holding of *Nollan* might be applauded for its cleverness

and imagination is no substitute for lack of an essential nexus between City regulatory action and any legitimate City purpose.

This case affords this Court the opportunity to elaborate on the standards applicable for determining what constitutes a legitimate state interest and the nature of the relationship between the regulation and the state interest. If allowed to stand, the Court of Appeal decision would exonerate any regulatory action from being considered a regulatory taking so long as such action might be a part of a reasonable legislative scheme even if, as applied, no essential nexus between the regulatory action and a legitimate government interest existed.

It is a teaching of *Agins* and *Nollan* that the government's regulatory action must substantially advance some legitimate government purpose for there to be an abridgment of property rights, absent compliance with the Fifth Amendment's requirement for payment of just compensation. It makes no difference whether or not a landowner is left with economically feasible use or value of his land while subject to regulation if the regulation is imposed without furthering any legitimate government interest.

D. REGULATORY ACTION WHICH PREVENTS ACCESS TO LAND OR RENDERS UTILITIES UNAVAILABLE MUST BE DEEMED TO HAVE DEPRIVED A LANDOWNER OF ALL ECONOMICALLY FEASIBLE USE OF HIS LAND SO THAT JUST COMPENSATION MUST BE PAID AS SET FORTH IN *LUCAS*

This Court has described at least two discrete categories of regulatory action as compensable without case specific inquiry into the public interest advanced in

support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general, no matter how minute the intrusion, and no matter how weighty the public purpose behind it, compensation has been required. See *Loretto vs. Teleprompter Manhatten CATV Corp.*, 458 U.S. 419 (1982). The second situation in which this Court has found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.

In *Lucas vs. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (*Lucas*), this Court acknowledged that the rhetorical force of the "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. The result has been inconsistent pronouncements by the Court. In *Lucas*, it was suggested that the answer to the difficult question of "deprivation" might lie in how the owner's reasonable expectations had been shaped by the state's law of property – whether and to what extent the state's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.

In *Eberle vs. Dane County Bd. of Adjustment*, 595 N.W. 2d 730 (1999), the Wisconsin Supreme Court unequivocally held that a lack of access caused by regulatory action must be deemed to have denied the landowner all economically feasible use of his property. This Court has made no corollary pronouncement.

In this case, the Court of Appeal observed that "the Loewensteins were not prevented from building a residence on the Tank Parcel if they could supply access and

were not prevented from supplying an access." *Loewenstein vs. City of Lafayette*, supra, 103 Cal. App. 4th @ 733. The only evidence in the court record unequivocally indicated that the Tank Lot was without any legal means of access or utilities. These circumstances were described in the analysis prepared by the District prior to sale of the Tank Parcel and were incorporated into the City's own Resolution which denied the Lot Line Adjustment Application. The only evidence in the record indicated that neither access nor utilities might be afforded the Tank Lot in the absence of the lot line adjustment the City denied. The Court of Appeal is correct that the City did not prevent the Loewensteins from supplying an access; its decision simply made that impossible. Similarly, the City's regulation did not prevent the Loewensteins from building a residence on the Tank Lot *if they could supply access and utilities – which they, of course, could not.*

The grant of Certiorari in this case would enable this Court to add precision to its formulation of its "deprivation standard" and would also enable this Court to reconcile conflicting decisions between the Wisconsin Supreme Court holding that the denial of access satisfied "deprivation" requirements and the California Courts' holding that the practical effect of regulatory action might be ignored so long as there is no express regulation which, by its terms, causes "deprivation".

CONCLUSION

Determinations of liability in regulatory takings cases are "essentially ad hoc, factual inquiries". *Lucas*, 505 U.S. @ 1015. In this case, those factual inquiries occurred at trial from which factual findings were made and the

conclusion was reached that the City of Lafayette deprived the Loewensteins of all economically feasible use of their land through regulatory action to their damage for no particular purpose without advancing any government interest.

The Court of Appeal made no factual inquiries, but did speculate regarding improbable development opportunities for the land in question and plausibly legitimate generalized interests which might have sustained regulatory action, but for the fact that the essential nexus between these generalized interests and the subject regulatory action was missing.

On the authority of *Landgate*, the Court of Appeal held that the City's wrongful and unjustifiable assertion of regulatory jurisdiction was but a usual and ordinary part of the "normal" regulatory process. If the Court of Appeal decision is allowed to stand, then this Court's holdings in *First English*, *Nollan*, and *Lucas*, have academic interest but no practical application in California.

It is respectfully submitted that this Petition for Writ of Certiorari should be granted if the rhetorical force of this Court's opinions is to be given any practical effect.

Dated: May 12, 2003

Respectfully submitted,

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Filed 11/13/02

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

PETER G. LOEWENSTEIN et al., Plaintiffs and Appellants, v. CITY OF LAFAYETTE, Defendant and Appellant.	A093590 (Contra Costa County Super. Ct. No. C98-03977)

The City of Lafayette (City) appeals from a judgment ordering it to pay just compensation for the delay caused by its erroneous denial of property owners' lot line adjustment application. Respondents, the Loewensteins, purchased a small, landlocked parcel, intending to use it as part of a division of an existing property without having to resort to the Subdivision Map Act (SMA). (Gov. Code, § 66410 et seq.)[1] When the City refused to allow the desired reconfiguration by a lot line adjustment, respondents obtained a ruling that the City erred and they were entitled to compensation. The central issue presented in this appeal is whether a two-year delay precipitated by the City's erroneous action is an unlawful temporary taking of private property for a public use. Our Supreme Court, in *Landgate, Inc. v. California Coastal Com.* (1998) 17

[1] All statutory references are to the Government Code.

Cal.4th 1006 (*Landgate*), resolved the same issue and replied in the negative. Under the facts of this case, we are bound to follow the rationale of that decision and reverse.

FACTUAL BACKGROUND

In 1984 or 1985, attorney Peter Loewenstein and his wife, Helen Loewenstein, built a 4400 square-foot home on a lot of approximately three acres in the City. The lot was created as part of a 1977 subdivision of four lots that included a restriction on creating any additional lots and was located in an area of lots with a greater than 15 percent slope, designated as hillside land. The area was zoned R-20 which provided for a minimum lot size of 20,000 square feet, or approximately one-half acre. When they bought the property, the Loewensteins understood that it could not be subdivided without City approval.

Between 1989 and 1992, the Loewensteins discussed building a second home on their three-acre lot. Peter Loewenstein engaged attorney Colette Stone to investigate the prospect of dividing the lot to allow him to build a second house. Loewenstein told Stone that with a property as large as his, there must be a mechanism by which he could divide it.

In reviewing the conditions of approval of the original subdivision, Stone discovered that the number of lots in the subdivision was restricted to the four existing lots. Stone determined that compliance with the subdivision procedure was an undesirable alternative. Stone spoke with various city planners and learned the requirements for obtaining a lot line revision. The lot line adjustment exception to the SMA stated that the adjustment could not create a greater number of parcels and that the affected

parcels must conform to local zoning and building ordinances. (Gov. Code, §§ 66410, 66412, subd. (d).) Unlike a subdivision proposal, a lot line revision involved only a ministerial decision by the City's Planning Services Manager, Michael Henn.

Stone understood the Loewensteins would need to acquire additional property to develop a second building site under the lot line revision procedure. If they did not purchase a second parcel, the plan to divide their lot would have been subject to the subdivision process, as the lot line adjustment exemption does not apply if the adjustment creates an additional lot. (§ 66412, subd. (d).) Stone's plan was to merge a smaller new lot into the existing lot, then divide the merged property into two lots. Stone would argue that the lot line adjustment only resulted in enlarging the newly acquired second parcel, which was outside the subdivision, rather than splitting the existing lot into two lots.

Stone learned that East Bay Municipal Utility District (EBMUD) had declared as surplus a small, neighboring parcel, formerly the site of a water tank. The parties refer to that parcel as the "tank parcel."[2] In early 1996, the Loewensteins purchased the tank parcel for $13,500, which was EBMUD's computed fair market value of

[2] Through Stone's inquiries, the Loewensteins learned that there were two undeveloped adjacent properties available. One of the undeveloped properties was 19 acres and the other was one-tenth of an acre. Ultimately, the Loewensteins decided that acquisition of the larger parcel was economically unfeasible and focused on the smaller parcel.

property in Lafayette at that time.[3] The tank parcel shared a common corner with the Loewensteins' existing lot, but did not share a boundary. They bought it "as is," knowing that it was only 4500 square feet and that it had no road or utility access. In his lot line adjustment application to the City, Peter Loewenstein stated that the tank site had no value. However, he knew that it was a legal non-conforming lot on which a single-family residence could be built if the site had utility and road access.

Miller, the neighboring property owner, orally agreed to give the Loewensteins a small triangular-shaped section of his land so that the tank parcel would share a common boundary and could be merged into their lot. Absent acquisition of the triangular piece of Miller's property, they had no access to the tank parcel. The Loewensteins never applied to the City for a lot line adjustment to adjust only the boundary of the Miller property to establish access.[4]

On September 11, 1997, the Loewensteins applied for a three-way lot line adjustment. The proposed lot line adjustment would have added the triangular portion of the Miller lot to the Loewensteins' lot, merged the tank parcel into the Loewensteins' lot, and divided that three-acre lot into Parcel 1 and Parcel 2. Parcel 1, containing the

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[3] In accordance with the applicable provisions of the Government Code, EBMUD first offered the tank parcel to the City. The City declined to purchase it and recommended that EBMUD sell the lot to an adjoining property owner, who could merge the land, or create a more useable lot through a lot line revision.

[4] Although Miller did not oppose Loewenstein's plan to build a second house, Loewenstein testified that Miller was "extremely adverse to any type of subdivision."

Loewensteins' home, would have been reduced to 1.07 acres and Parcel 2, the former back portion of the lot, now including the tank parcel, would have been 2.12 acres.

Stone hand carried the application to Michael Henn and waited for him to sign off on it. Instead, a series of communications ensued explaining why the application was not being processed. Henn deferred to City Attorney Charles Williams, who was reviewing the application. While Stone characterized the process as merely expanding the smaller tank parcel into a larger conforming lot, the City viewed the application as a splitting of the Loewensteins' existing lot within the subdivision. Stone later testified that neither the planning commission nor the city council gave her any advance assurances that a lot line adjustment application would be approved.

Ultimately, the City denied the lot line adjustment application, and the Loewensteins then appealed that decision to the Lafayette City Planning Commission (commission). The commission denied the appeal, stating that the proposed action would place a fifth lot and house in a subdivision that was restricted to four lots. The commission also made a finding that the proposed adjustment would not be consistent with local zoning because it would reduce the lot area of the proposed new parcels to 1.07 and 2.12 acres which did not conform to the minimum lot area requirements of the municipal code, based on the average slope of lots defined as hillside land. In the commission's opinion, the lot line revision proposal was a circumvention of the normal subdivision requirements.

The commission's decision was appealed to the city council. On May 11, 1998, that body issued a resolution denying the adjustment. Additional hearings were held

before the city council on June 22, 1998, July 27, 1998, and August 10, 1998. Peter Loewenstein explored filing a subdivision application after the city council issued its May 11 resolution, but determined that he did not want to risk a denial of such an application, in light of the time and expense involved. Loewenstein asked the city council to amend the former resolution to make the denial effective immediately so that a court challenge could be instituted. On August 10, 1998, the city council complied, and issued a second denial in Resolution No. 69-98, that superceded the original denial.

Resolution No. 69-98 recited the underlying facts of the lot line adjustment application and determined that a fifth lot could not be authorized in the subdivision without compliance with the City's subdivision regulations and the SMA. The resolution stated that approving the Loewensteins' application would have the effect of creating a new lot, and of creating a fifth lot in the restricted subdivision. It acknowledged the Loewensteins' view that they were not creating a fifth lot because they were adding approximately two acres of their lot to the tank parcel, which was outside the subdivision. The resolution determined that the building site for the proposed residence would be on the split-off portion of the original lot, rather than on the tank parcel, resulting in a fifth lot serviced by infrastructure and improvements constructed for the original four-lot subdivision. A specific building site was not a part of the application. The resolution concluded that the Loewensteins' proposal deprived the City of its authority over subdivisions and allowed the Loewensteins to avoid the mandatory and discretionary requirements that are a part of the subdivision process.

On September 24, 1998, the Loewensteins filed a complaint in superior court seeking administrative mandamus, ordinary mandamus, declaratory relief and damages for inverse condemnation under the takings clause of the Fifth Amendment of the United States Constitution.

The parties submitted the case to Superior Court Judge Richard L. Patsey, based on the administrative record, oral argument and documents evidencing the legislative history of the lot line adjustment exception to the SMA. (§ 66412, subd. (d).) On March 9, 1999, Judge Patsey filed an order granting the petition for writ of mandate, stating "granting the lot line adjustment would not violate any zoning, building or slope density ordinances or regulations of [r]espondent City of Lafayette. Thus, whether the standard of review be substantial evidence or arbitrariness, [r]espondent City of Lafayette's denial has no support in the administrative record." Judge Patsey rejected the City's argument that the section 66412, subdivision (d) exception for lot line adjustments was not applicable, stating that there was no restriction in the Government Code against creating a greater number of parcels within a subdivision, but only against creating a greater number of parcels than previously existed.

The Loewensteins filed a memorandum of costs that claimed attorney fees under section 800, providing for fees when the "determination of the proceeding was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof in his or her official capacity, . . . " The court granted the City's motion to tax costs, stating that denial of the lot line adjustment application was not arbitrary and capricious within the meaning of section 800.

At the April 1999 hearing on the motion to tax costs, Judge Patsey characterized the case as "a very close and . . . difficult case" and acknowledged that the legislative history supported the City's argument and that the City's contention that it should be able to control development "made a good deal of sense." The court continued: "This was no minor lot line adjustment by any stretch of the imagination in my view and, therefore, I had to wrestle with the question whether or not the result of burdening a subdivision with five homes by this lot line adjustment, where it was originally designed to accommodate four homes, was appropriate and lawful." The court concluded: "[B]y no stretch of the imagination can I say, given the wrestling I did with this issue, that the City's position was arbitrary or capricious." On November 3, 1999, the court issued its writ of mandate ordering the City to set aside its denial of the application and reconsider its action in light of the court's decision.

In August of 1999, the parties submitted issue conference statements on the takings issue. The Loewensteins argued that denial of the lot line adjustment application constituted a taking of their property without just compensation. The City argued the legal issues of ripeness and that its action was not a taking under *Landgate, supra,* 17 Cal.4th 1006.

On January 27, 2000, Judge Patsey issued an order rejecting the City's ripeness argument, stating that it would be futile for the Loewensteins to proceed with an application under the SMA and that there was no possibility that the landlocked tank parcel could be developed independent of the residential parcel.

On April 24, 2000, Judge Rivera, to whom the case had been reassigned, issued an order regarding the City's argument that *Landgate* precluded a finding of inverse condemnation as a matter of law. That order consisted of two findings. The first finding was that: "[t]he court cannot find on the record presented that the City's action was so objectively unreasonable that it was made for no other reason than to delay the proposed project. To the contrary the City's decision, though erroneous, was rational and, as stated by Judge Patsy [sic], not arbitrary or capricious. Nor can a delay of a little over two years for processing the application, the administrative appeals and this litigation be considered an unreasonable delay that results in a taking." Despite the finding that the regulatory delay alone did not amount to a taking, the court without elaboration found there were disputed issues of fact and referred the issue for trial of what the order characterized as "the remaining theory for taking" under *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104 (*Penn Central*) and *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761 (*Kavanau*). Judge Rivera subsequently recused herself and the matter was assigned to Judge Kolin for trial.

The trial court bifurcated the issues of liability for a taking and the appropriate amount of just compensation. At the trial, the testimony focused on the nature of the City's objections to the application and the potential uses of the tank parcel.

Planning Services Manager Michael Henn testified that the conditions of approval of the Loewensteins' subdivision restricted it to four lots. The restriction was supposed to be formalized though the recordation of a scenic easement deed. He did not believe the scenic easement deed

had ever been recorded.[5] He stated if the tank site had road and utility access, a two-story, 3150 square-foot residence could be constructed on the site. In Henn's opinion, if a lot line application had been filed merely seeking to transfer the triangular portion of the Miller property to the Loewensteins and provide access to the tank parcel, it would not be considered a subdivision and would have been routinely granted.

On July 3, 2000, Judge Kolin issued a decision following the trial. The court reviewed the case law on inverse condemnation, noting that a regulation that deprives a property owner of all economically beneficial use of the land effects a taking requiring just compensation. Although the court noted *Landgate,* it stated that the case was similar to *San Dieguito Partnership v. City of San Diego* (1992) 7 Cal.App.4th 748 (*San Dieguito*), and determined that the City had used an improper standard in evaluating the lot line adjustment application. Based on Judge Patsey's findings and the testimony and documents presented at trial, the court determined that the impact of the City's action was to deny the Loewensteins "substantially all economically viable use of their property." The court found, on the evidence presented: that the Loewensteins could not develop the landlocked tank parcel without the City's approval of the application; that the property was without market value because it was purchased only with a view towards the lot line adjustment;

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[5] City planner Elizabeth Van Popering testified that in addition to the restriction in the subdivision conditions, the conditions of a variance that the Loewensteins had obtained when they built their home included the four-lot limitation.

that the City's regulatory action was unrelated to any substantial public purpose; and that Henn's testimony regarding the rejection of the Loewensteins' application was not credible in light of the evidence that in 16 years, over 200 lot line adjustments had been approved.

The court listed three specific findings in its decision: (1) the Loewensteins purchased the tank parcel with reasonable investment-backed expectations that it could be rendered a buildable lot through the lot line adjustment process; (2) the economic impact of the City's regulation denied all economically viable use of the property; and (3) the City's regulatory action failed to advance any legitimate state interest and involved the application of an arbitrary standard in direct conflict with the plain language of section 66412, subdivision (d) and *San Dieguito*. The court awarded $611,666.66 in just compensation for the loss of use of the proposed new parcel as merged with the tank parcel. The court also awarded costs and attorney fees to the Loewensteins.

A corrected judgment incorporating the issuance of the writ of mandate and findings on liability and just compensation was filed on October 2, 2000. The City moved for a new trial, which was denied by operation of law.[6] The City filed a notice of appeal from the judgment.

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[6] The court filed an order purporting to reopen the case to determine whether the City's withdrawal of its rejection of the lot line adjustment application affected the amount of damages. The order was filed beyond the statutory time period in which the court could have ruled on the new trial motion and the motion was therefore denied by operation of law. (Code Civ. Proc., § 660 [time for ruling on new trial motion is 60 days after notice of entry of judgment].)

The Loewensteins filed a cross-appeal from portions of Judge Patsey's order denying attorney fees under section 800.

On November 13 and 27, 2000, the City rescinded its denial of the request for a lot line adjustment and withdrew its legal position on which the denial was based, thereby rendering the taking temporary. (*First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 321 (*First Lutheran*) [after taking occurs government retains option to withdraw invalidated regulation].) On May 1, 2001 the City granted the re-submitted lot line adjustment application.[7]

DISCUSSION

The Constitution prohibits the government from taking private property for public use without just compensation. (U.S. Const., 5th & 14th Amends; Cal. Const., art. I, § 19.) But the prohibition has limits that allow the government to fulfill its purpose without paying for every exercise of the police power. As stated by Justice Holmes in *Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." (260 U.S.

[7] The City's unopposed request for judicial notice of its formal withdrawal of the denial of the request for a lot line adjustment and its May 1, 2001 letter granting the re-submitted lot line adjustment is granted. (*San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 552-553 [court took judicial notice of legal opinion letter from county as official act of legislative department of any state].)

at p. 413.) "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." (260 U.S. at p. 415.)

When government regulation denies an owner all economically beneficial use of the land, a taking is established and compensation is due. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015.) When the regulation deprives the owner of something short of all economically beneficial use, courts consider the factors identified in *Penn Central, supra*. Those factors include "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . . [and] the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, [citation], than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." (*Penn Central, supra,* 438 U.S. at p. 124.)

A recent case reconfirmed that the analysis described in *Penn Central, supra,* 438 U.S. 104, is still the appropriate method of determining whether a taking has occurred, in the absence of the categorical takings represented by actual occupation of the land or where regulation deprives the landowner of all economically viable use of the land. (*Tahoe-Sierra P. Council v. Tahoe RPA* (2002) 535 U.S. 302.)

In *First Lutheran, supra,* 482 U.S. 304, the United States Supreme Court addressed the appropriate remedy when government regulation in fact causes a temporary

deprivation of all economically viable use of private property. Although the *First Lutheran* case determined that compensation was appropriate for a temporary taking, it did not address the issue of whether the regulatory activity in that case actually resulted in a taking. The court stated that it was not addressing "the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." (*Id.* at p. 321.)

Some of the most difficult questions in "taking" jurisprudence arise from the issues implicated when a temporary taking is caused by government regulation and land use decision making. (See, e.g., Lycett, *Landgate, Inc. v. California Coastal Commission: Why Temporary Takings Law is "Screwed Up."* (2000) 7 Hastings W.-N.W.J. Env. L. & Policy 55.) However, our Supreme Court has directly addressed the subject of temporary taking caused by delays in issuing land use permits. (*Landgate, supra,* 17 Cal.4th 1006.) The *Landgate* court unequivocally rejected the argument that a temporary loss of all use of property caused by the erroneous denial of a development permit necessarily results in a compensable taking. But the *Landgate* court also noted that a different case would be presented if a delay in issuing a permit "was so unreasonable from a legal standpoint" as to support the conclusion that the government agency was only delaying the development project. (*Landgate, supra,* 17 Cal.4th at p. 1024.)

In support of the trial court's decision in this case, the Loewensteins try to fit this case into the exception for legally unreasonable acts mentioned in *Landgate.* They rely primarily on two cases, *San Dieguito, supra,* 7 Cal.App.4th

748 and *Ali v. City of Los Angeles* (1999) 77 Cal.App.4th 246 (*Ali*), to argue that the City's legal position was objectively unreasonable, which precludes reliance on *Landgate*.

Alternatively, the Loewensteins contend that even if the City's actions did advance a legitimate interest, denial of the application interfered with their reasonable investment-backed expectations, caused a direct economic impact on them, and thus failed the *Penn Central* analysis.[8] We disagree with both contentions for the following reasons.

The Case Is Governed By the Holding in *Landgate*

We agree with Judge Rivera's ruling that the City's action was not objectively unreasonable because it was not taken solely to delay the proposed project. As further developed by the testimony at trial, even assuming the City's decision was erroneous, it was rational and not arbitrary or capricious.[9] In light of the facts developed in this case, the delay of a little over two years to resolve the

[8] Because we find there was no taking as a matter of law, we do not consider the amount of compensation due. However, we note that there was no evidence that the City restricted the Loewensteins' ability to sell the tank parcel, to enter it or to exclude others from it. Peter Loewenstein candidly admitted that if there was road and utility access, it was possible to develop the tank parcel independently. Furthermore, Loewenstein testified that although he believed the best building site was on the tank parcel itself, he never submitted an application for a particular building site or access for the proposed new parcel, or talked with anyone at the City about a specific building site.

[9] Because the City complied with the writ of mandate, the issue of the correctness of the City's action is not before us.

threshold issue of the availability of the lot line adjustment exception to the SMA was not an unreasonable regulatory delay. *Landgate* mandates these conclusions as we now explain.

The issue analyzed in *Landgate* was stated by Justice Mosk as: "whether a delay in the issuance of a development permit partly owing to the mistaken assertion of jurisdiction by a government agency is a type of 'temporary taking' contemplated in *First Lutheran,* or if it is more in the nature of a 'normal delay' that does not constitute a taking." (*Landgate, supra,* 17 Cal.4th at p. 1010.) The plaintiff in *Landgate* bought a sloped lot in the Malibu Hills, subject to the jurisdiction of the California Coastal Commission (Coastal Commission) that along with a second lot, had been reconfigured by the prior owners with the consent of the county. (*Id.* at p. 1010.)

When Landgate received county approval for grading and building a large home on its property, the Coastal Commission, based on staff recommendations and a memorandum from the Attorney General, continued the matter to consider the threshold issue of whether the earlier lot line adjustment was legal. (*Id.* at pp. 1011-1013.) When the Commission ultimately denied the application, Landgate filed a petition for writ of mandate and a complaint alleging a taking without just compensation. (*Id.* at p. 1013.)

The trial court granted Landgate's petition and set aside the Commission's denial, stating that the lot line adjustment was not subject to the Commission's jurisdiction. The Court of Appeal upheld the trial court's decision, stating that the Commission's position regarding the lot line adjustment would render the property valueless. After

the writ of mandate issued, a modified application was approved with conditions. (*Id.* at pp. 1014-1015.)

Landgate then moved for summary adjudication on its takings claim, arguing that the erroneous assertion of jurisdiction to determine the legality of the lot line adjustment prevented all economically viable use of the property. Although the trial court granted Landgate's motion and the Court of Appeal affirmed, the Supreme Court reversed. The Supreme Court summarized applicable takings jurisprudence, culminating with the *First Lutheran* case. The court noted that *First Lutheran* did not address "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like. . . ." (*Id.* at pp. 1015, 1017, 1032.) "Virtually every court that has examined the issue has concluded . . . that a regulatory mistake resulting in a delay does *not,* by itself, amount to a taking of property. [Citations.]" (*Landgate, supra,* 17 Cal.4th at pp. 1018-1019.) The *Landgate* court agreed with the many other courts concluding that "an error by a governmental agency in the development approval process does not necessarily amount to a taking even if the error in some way diminishes the value of the subject property, . . ." (*Id.* at p. 1020.)

The court acknowledged that if the government's error is "of a particular constitutional type – the passage and enforcement of a law or regulation that deprives property of all value – then the teaching of *First* [*Lutheran*] is that such an error is a compensable taking. But government land use regulations and decisions . . . which, despite their ultimately determined statutory defects, are part of a reasonable regulatory process designed to advance legitimate government interests, are not takings of property. . . ." (*Id.* at p. 1021.)

Applying the *Landgate* analysis to this case, there is no substantial evidence to support the conclusion that the City's action was taken for any motive other than carrying out a substantial government interest. At oral argument of this appeal, the Loewensteins argued that the trial court based its decision in part on its determination that Henn's testimony was not "persuasive or entirely credible" and that 200 other lot line applications had been granted in the past. According to respondents, we are bound by the trial court's findings of fact. The legitimacy of a city's interest in land use planning, as expressed in the applicable resolution in this case, does not rest on the testimony of Henn. Henn, who was only the planning services manager, could not have testified as to the intent or legitimacy of an action by the council.

The trial court's finding regarding the credibility of one individual, even if accepted, has little bearing on the ultimate issue of the local government's motive. Resolution of that question is an objective determination, drawn not from an inquiry into individual motives, but from an analysis of the evidence supporting the government agency's official findings. "The proper inquiry is not into the subjective motive of the government agency, but whether there is, objectively, sufficient connection between the land use regulation in question and a legitimate governmental purpose so that the former may be said to substantially advance the latter." (*Landgate, supra,* 17 Cal.4th at p. 1022.)

Peter Loewenstein presented evidence of other lot line adjustments that were approved by the City to the council. He testified at the trial that he reviewed a number of applications and selected the best four or five that he felt would demonstrate why his application should be granted.

When asked on cross-examination if any of the applications concerned a restriction on further subdivision, Loewenstein answered that he thought, but was not certain, that one of the applications may have involved such a restriction. When confronted with the specific application, he conceded that he had not stated there was a similar restriction in his presentation to the City. He also conceded that he had not checked on the particular restrictions in that application.

Even if Loewenstein had presented evidence that the City made exceptions to a similar subdivision restriction in other applications, the existence of exceptions to a valid policy regarding development would not negate the City's showing that the policy was legitimate in this case. Our Supreme Court flatly rejected a similar argument in *Landgate,* stating: "The fact that there may have been exceptions to this policy, based on considerations particular to these specific projects, for reasons not present in the current administrative record and about which we can only speculate, does not negate the fact that the [Coastal] Commission had a rational policy preference for concentrating development on the south side of De Butts Terrace." (*Landgate, supra,* 17 Cal.4th at p. 1024.) The evidence that other lot line applications were granted is not substantial evidence in support of the trial court's finding that the City was not pursuing a legitimate governmental interest.

The City's reasons for rejecting the lot line revision application, as expressed in the official resolution, were based on concerns that the reduced area of the new parcels would not conform to the minimum lot size requirements for hillside lots, and that the application created a fifth lot in a duly restricted subdivision with improvements and

utilities designed for four lots. Even if the City incorrectly maintained that lot size and subdivision restrictions applied, the monitoring of density and hillside slope requirements are legitimate governmental interests. (See, e.g., *Northwood Homes, Inc. v. Town of Moraga* (1989) 216 Cal.App.3d 1197, 1202 [local ordinance placing stringent restrictions on hillside development upheld as reasonably related to the regional welfare]; *Del Mar v. California Coastal Com.* (1984) 152 Cal.App.3d 49, 52 [slope and density considerations supported commission's decision to deny permit].) Hillside properties require particular oversight. The 1977 City-imposed land use restriction prohibiting further subdivision was a legitimate exercise of governmental policy and regulatory authority.

Unlike the summary lot line adjustment procedure, the SMA provides opportunities for neighborhood input on the effects of development and detailed study of all impacts on the community. (See, e.g., *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 616 [neighbors entitled to notice and opportunity to be heard before the approval occurs]; *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 555 [SMA gives opportunity to other property owners to be heard where subdivision plan impacts topography, density, public health, access rights, or community land use plans].) Protecting the rights of its residents to be heard on community land use is also a valid governmental purpose. Although the record does not demonstrate any opposition of immediate neighbors to the lot line adjustment proposal, a formal subdivision process with notice to affected landowners affords broader community comment.

When *Landgate* applies, the *Penn Central* factors will, of necessity, be absent. The normal delay in approving the

application cannot be said to have " 'prohibited a beneficial use to which [the property] had previously been devoted' [citation], thus interfering with [the Loewensteins'] 'primary expectation' [citation]." (*Kavanau, supra,* 16 Cal.4th at p. 780.) The delay here did not abrogate the total use of the property, as did the government action in *Penn Central, supra,* 438 U.S. at pp. 127-128.) There was no physical invasion, no extinguishing of a fundamental attribute of ownership, or loss of all beneficial use of the tank parcel. (*Kavanau, supra,* 16 Cal.4th at pp. 780-781.)

The Loewensteins were not prevented from building a residence on the tank parcel if they could supply access and were not prevented from supplying an access. Henn testified that under existing setback and frontage requirements, a 1575 square foot single story and a 3150 square foot two-story house could be constructed on the tank lot. The only delay was in obtaining permission to use a summary procedure to change the use of the acquired parcel, to enlarge it and divide the existing parcel. "[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." (*Penn Central,* 438 U.S. at p. 130 [rejecting argument that taking of air space rights occurred].)

The delay in the Loewensteins' development plans caused by the need for resolution of this threshold issue, and the court's subsequent determination that the City was mistaken, does not convert the pursuit of a reasonable policy into an unconstitutional taking. (See also *Littoral Development Co. v. San Francisco Bay Conservation etc. Com.* (1995) 33 Cal.App.4th 211, 221 [no unconstitutional regulatory taking where property was only subject to delay

caused by uncertainty as to regulatory jurisdiction].) Landgate, Inc. similarly contended that from the time the development plan was denied in February 1991 until the time it was approved in February 1993 after the lot line issue had been resolved by litigation, the development process was at a standstill, effectively depriving the property of all economic benefit. (*Landgate, supra,* 17 Cal.4th at pp. 1013, 1015.) But *Landgate* explains that a judicial determination of the validity of certain preconditions to development is a normal part of the development process.[10] (*Landgate, supra,* at p. 1030.) Such a temporary bottleneck in the process is not a taking of property.[11]

The Exception Noted in Landgate Does Not Apply

The *Landgate* court noted an exception to its holding that normal delay in obtaining permits is not a taking, even though the government's position substantially advances a legitimate state interest, if the "position was so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it." In such a case, the court stated that this kind of "delaying tactic" could not be said to advance any valid government purpose. (*Landgate, supra,* 17 Cal.4th at p. 1024.)

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[10] Numerous examples are set forth in *Landgate, supra,* 17 Cal.4th at pp. 1030-1031. Cf. Comment, Horsley, *The Abnormalcy of Normal Delay* (2001) 28 Pepperdine L.Rev. 414, 428-429.

[11] For example, a temporary delay in receiving the benefits of property ownership, such as a delay in receiving increased rental income due to an imposed rent increase limit, does not constitute a taking of property. (*Kavanau, supra,* 16 Cal.4th at p. 780.)

The Loewensteins contend that *San Dieguito, supra,* 7 Cal.App.4th 748 and *Ali, supra,* 77 Cal.App.4th 246 decided the precise question at issue here adversely to the City and made the City's insistence on blocking the lot line adjustment objectively unreasonable and without legal support. Both of the cited cases are transparently distinguishable and do not purport to decide the issue facing the City in this case.

In *San Dieguito,* a developer applied for a lot line adjustment to reconfigure nine existing parcels in a 189-acre area. (*San Dieguito, supra,* 7 Cal.App.4th at p. 751.) The application was rejected based on a city attorney's opinion that it created more than five new lots and was, therefore, subject to the SMA. (*Id.,* at pp. 753-754.) The owner filed an action seeking to compel the city to process a lot line adjustment under the exception in section 66412, subdivision (d). The trial court agreed with the city that the lot line adjustment exception to the SMA was intended to permit only minor changes in parcel lines and implied that only two parcels could be the subject of an adjustment. The Court of Appeal in *San Dieguito* rejected the trial court's reasoning, stating that the language of subdivision (d) was clear, and it did not refer to minor changes or limit the number of parcels.[12] (*San Dieguito, supra,* 7 Cal.App.4th at pp. 756-759.)

Ali, supra, 77 Cal.App.4th 246 does not address the issue facing the City in this case. In *Ali,* the city's action of

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[12] In 2001, the Legislature changed the application of the SMA exception to limit it to: "a lot line adjustment between four or fewer existing adjoining parcels, . . . "

denying a demolition permit for a hotel that was substantially destroyed in a fire based on a local ordinance prohibiting demolition of such housing violated the Ellis Act. (§ 7060, subd. (a).) The court distinguished *Landgate,* based on that court's discussion of whether the actions of the regulating government entity advance a legitimate government purpose. The *Ali* court held that the city's action violating state law was arbitrary and unreasonable in light of the earlier case of *Javidzad v. City of Santa Monica* (1988) 204 Cal.App.3d 524, that held a city ordinance governing rental property was preempted by the Ellis Act. (*Ali, supra,* 77 Cal.App.4th at p. 255.)

The Loewensteins argue that like the cities in *San Dieguito* and *Ali,* the City here has taken an objectively unreasonable and legally unsupportable position that leads to the conclusion that it was seeking only to delay development. They contend that the City should have known it could not reject the application on the ground it violated municipal hillside ordinances or created new parcels in a restricted subdivision because *San Dieguito* decided this precise issue. Without commenting on the rationale of *San Dieguito* and *Ali* and because they are distinguishable, we reject the notion that they apply here for the following reasons.[13]

Unlike the city in *San Dieguito,* the City here did not deny the application because it was inferring limitations on the number of lots subject to the lot line exception or

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[13] The reasoning of *Ali* has been criticized. (Alperin, *The "Takings" Clause: When Does Regulation "Go Too Far?"* (2002) 31 Sw.U.L.Rev. 169, 221-225.)

because it assumed that only minor changes could be processed under the exception. It rejected the application because it believed the adjustment would create an extra lot in a restricted subdivision and because of concerns that it would violate municipal ordinances regarding hillside property. The exception in section 66412, subdivision (d) expressly recognizes that a city may consider whether the proposed lot line adjustment will violate local land use ordinances. The exception states: "A local agency . . . shall limit its review and approval to a determination of whether or not the parcels resulting from the lot line adjustment will conform to the local zoning and building ordinances." Unlike the City of San Dieguito, the City of Lafayette attempted to do no more than what the statute allows – ensure conformance with local zoning and building restrictions.

Moreover, relying on the independent advice of the city attorney, the City rejected the proposal for reasonable land use purposes. City Resolution No. 69-98, in the record, sets forth legitimate reasons that advance governmental interests for denying the lot line adjustment application.

The City's view of the Loewensteins' application is rational and closely related to the planning goals of local zoning and building ordinances. The result of the Loewensteins' proposed lot line adjustment would have split the three-acre parcel with the aim of building a fifth house on the parcel in the restricted hillside subdivision. By purchasing the small tank parcel, and folding it into this plan, they could argue that they met the letter of the lot line exception, in that they owned two lots before, and two lots after the adjustment. The Loewensteins' proposal was a creative concept, worthy of the City's consideration. To avoid the City's concerns about building a fifth home, the Loewensteins argued they were not merging the tank parcel

into the subdivision lot, but were pulling a section of the original lot out of the subdivision and placing it into the tank parcel. These fine distinctions, although accepted by the trial court's ruling that the City's view was wrong, do not make the City's valid concerns either legally unreasonable or logically deficient. Judge Patsey's decision did not transform an honest difference of opinion into a compensable taking.

Neither *San Dieguito* nor *Ali* supply the applicable legal rule for the unusual lot line adjustment proposed by the Loewensteins. The City here did not violate a state law and did not claim to read limitations into the SMA, but sought only to make certain that the application complied with local land use regulations. This case fits like a hand in a glove with the rule established by *Landgate*. Resolution of the threshold issue of the legality of the lot line adjustment was a normal delay in the process of obtaining a permit pertaining to land use. (*Landgate, supra,* 17 Cal.4th at pp. 1017-1018.)

The Penn Central Factors Are Negated By the Landgate Analysis

The Loewensteins argue that even if the City was pursuing a valid governmental interest, its delay in processing the lot line adjustment application interfered with their reasonable investment-backed expectations and therefore failed the *Penn Central* analysis. (*Kavanau, supra,* 16 Cal.4th at p. 775 [rent control regulation that does not deprive owner of all economic use is evaluated by *Penn Central* factors].) As noted above, the *Penn Central* factors include consideration of the economic impact of the regulation, the character of the government's action and the extent of interference with "distinct investment-backed expectations." (*Penn Central, supra,* 438 U.S. at p. 124.)

However, the *Penn Central* factors are resolved by the analysis in *Landgate*. Once a court determines that a governmental entity engaged in decision-making whose purpose is not delay for delay's sake but legitimate oversight, the question of whether a landowner has a reasonable investment-backed expectation that is impacted in a manner requiring compensation is, of necessity, answered in the negative. A landowner can have no reasonable expectation that there will be no delays or bona fide differences of opinion in the application process for development permits. Sometimes the application process must detour to the court process to resolve a genuine disagreement. Because such delay comes within the *Landgate* category of normal delays in the development approval process, there is no taking even if the value of the subject property is diminished in some way. (*Landgate, supra,* 17 Cal.4th at p. 1020.)

Similarly, a normal delay in the approval process does not prohibit a use to which the property was previously devoted, or result in acquisition of resources for a public purpose, but is inherent in the legitimate exercise of a city's duty to monitor land use planning. (*Kavanau, supra,* 16 Cal.4th at pp. 780-782.) The temporary economic impact on a landowner caused by a *Landgate* delay is considered a normal incident of property ownership, and as such, does not figure in the weighing process against the government in a *Penn Central* analysis. In short, the analysis stops when *Landgate* forecloses it.

The Cross-Appeal

The Loewensteins cross-appeal from Judge Patsey's order denying attorney fees for the mandamus portion of

the case under section 800. This contention is based on the argument that the City's actions were arbitrary and capricious. The trial court found otherwise and we agree.

Section 800 provides for attorney fees: "where it is shown that the award, finding, or other determination of the proceeding was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof in his or her official capacity, . . . " Judge Patsey made explicit comments to the effect that the City's position had some support in the legislative history, and opined that the Loewensteins' application was not a routine lot line adjustment and that it presented "a very close and . . . difficult case." We agree that the City's position regarding the application "made a good deal of sense." The Loewensteins failed to show that this case involved arbitrary or capricious agency action.

DISPOSITION

The judgment on the takings claim is reversed.[14] The case is remanded with directions to enter a new judgment in favor of the City. The order regarding attorney fees is affirmed. Appellant is entitled to costs.

Marchiano, P.J.

[14] In light of our determination that *Landgate* is the linchpin in this case, there is no need to decide appellant's argument that Judge Patsey erred in determining "ripeness."

We concur:

_____
Swager, J.

_____
Margulies, J.

CERTIFIED FOR PUBLICATION

Loewenstein et al. v. City of Lafayette, A093590

Trial Court: Contra Costa County Superior Court

Trial Judge: The Honorable Judge Patsey
The Honorable Judge Rivera, and
The Honorable Judge Kolin

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COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 1

PETER LOEWENSTEIN, et al.,
Plaintiffs and Appellants,
v.
CITY OF LAFAYETTE,
Defendant and Appellant.

A093590
Contra Costa County No. C9803977

(Filed Dec. 10, 2002)

BY THE COURT:

The petition for rehearing is denied.

Date: DEC 10 2002 MARCHIANO, P.J. P.J.

Court of Appeal, First Appellate District,
Division One – No. A093590
S112362

IN THE SUPREME COURT OF CALIFORNIA

En Banc

PETER G. LOEWENSTEIN et al.,
Plaintiffs and Appellants,

v.

CITY OF LAFAYETTE,
Defendant and Appellant.

(Filed Feb. 11, 2003)

Petition for review DENIED.

Chin, J., and Brown, J., are of the opinion the petition should be granted.

GEORGE
Chief Justice

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
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PETER LOEWENSTEIN, et al.,
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v.
CITY OF LAFAYETTE,
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A093590
Contra Costa County No. C9803977

** REMITTITUR **

I, Ron D. Barrow, Clerk of the Court of Appeal of the State of California, for the First Appellate District, do hereby certify that the decision entered in the above-entitled cause on November 13, 2002 has now become final.

✓ Appellant ___ Respondent to recover costs
____ Each party to bear own costs
____ Costs are not awarded in this proceeding
____ Costs are not awarded in this proceeding

Witness my hand and the Seal of the Court affixed at my office this FEB 18 2003

Ron D. Barrow
Clerk of the Court

(SEAL)

BETH ROBBINS
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF CONTRA COSTA

PETER G. LOEWENSTEIN and HELEN LOEWENSTEIN, Plaintiffs, vs. CITY OF LAFAYETTE, a Municipal Corporation, and DOES 1 through 50, inclusive, Defendants.	Case No. C98-03977 NOTICE OF ENTRY OF JUDGMENT

NOTICE IS HEREBY GIVEN, that on April 8, 2003, the attached Judgment After Appeal was entered in the above-captioned action.

Dated: April 16, 2003 SHUTE, MIHALY &
WEINBERGER LLP
By: /s/ E. Clement Shute, Jr.
E. CLEMENT SHUTE, JR.

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San Francisco, CA 94102
Tel: (415) 552-7272
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Attorneys for Defendant
CITY OF LAFAYETTE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF CONTRA COSTA

PETER G. LOEWENSTEIN and HELEN LOEWENSTEIN, Plaintiffs, vs. CITY OF LAFAYETTE, a Municipal Corporation, and DOES 1 through 50, inclusive, Defendants.	Case No. C98-03977 ~~[PROPOSED]~~ JUDGMENT AFTER APPEAL (Filed Apr. 8, 2001)

This case arises out of the decision of the City of Lafayette ("City") to deny a lot line adjustment application submitted to it by Helen and Peter G. Loewenstein

("Plaintiffs"). On September 24, 1998, Plaintiffs initiated their legal challenge to the City's decision by filing a petition for writ of mandate and complaint for declaratory relief and damages under a constitutional takings theory.

On March 9, 1999, Judge Patsey of this Court entered an order granting Plaintiffs' petition for writ of mandate, directing the City to set aside its prior decision denying the lot line adjustment application, and ordering the City to reconsider that application. Pursuant to California Government Code section 800, Judge Patsey also entered an order denying Plaintiffs' request for attorney fees for litigation of their petition for writ of mandate (hereinafter "order regarding attorney fees"). On November 16, 2000, the City filed an amended return to the writ of mandate indicating that the City would not pursue an appeal of the writ of mandate. On January 22, 2001, the City notified Plaintiffs by letter that it would grant a renewed request for a lot line adjustment, and inquired how respondents intended to proceed. On May 1, 2001, the City granted the lot line adjustment requested by Plaintiffs.

Judge Kolin of this Court held a trial on Plaintiffs' takings claim on June 12-14, 2000, and awarded Plaintiffs a total of $611,666.66 in damages (including interest) for that claim in a judgment entered on September 25, 2000 (hereinafter "takings claim judgment"). The City made a motion for a new trial, which motion was denied by operation of law.

On December 27, 2000, the City filed a notice of appeal of the takings claim judgment and on January 16, 2001, Plaintiffs filed a notice of cross-appeal of the order regarding attorney fees. On November 13, 2002, the California Court of Appeal reversed this Court's takings

claim judgment against the City, affirmed this Court's order regarding attorney fees, and indicated that the City is entitled to recover costs. The Court of Appeal also remanded the case with directions to enter a new judgment in favor of the City.

The Court of Appeal denied Plaintiffs' petition for rehearing on December 10, 2002. The California Supreme Court denied Plaintiffs' petition for review on February 11, 2003. The Court of Appeal issued the remittitur on February 18, 2003.

It is therefore ORDERED, ADJUDGED AND DECREED that:

1. This Court's September 25, 2000 judgment for Plaintiffs is vacated;

2. Judgment is entered for the City pursuant to the Court of Appeal's decision;

3. Plaintiffs shall not recover any damages or receive any declaratory relief;

4. Plaintiffs shall not recover any attorney fees or costs; and

5. The City shall recover from Plaintiffs litigation costs in the amount of $1920.05.

Dated: 3/21/, 2003

By: /s/ Terence L. Bruiniers
Judge of the Superior Court

HELD FOR 10 DAYS

DECLARATION OF SERVICE

Peter G. Loewenstein and Helen Loewenstein v. City of Lafayette Superior Court, County of Contra Costa – Case No. C 98-03977

I, the undersigned, certify and declare that I am over the age of 18 years, employed at 396 Hayes Street in the City and County of San Francisco, State of California, and not a party to the above-entitled case. On April 16, 2003, I served the following document:

NOTICE OF ENTRY OF JUDGMENT

and by placing a true copy of said document in a sealed envelope, with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as follows:

David J. Bowie
Bowie & Bruegmann, LLP
1700 North Broadway,
Suite 350
Walnut Creek, CA 94596

Peter G. Loewenstein
Peri Executive Centre
2033 North Main Street,
Suite 430
Walnut Creek, CA 94596

I do hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 16, 2003, at San Francisco, California.

/s/ Mike Lewis
Mike Lewis

BEFORE THE CITY COUNCIL OF THE CITY OF LAFAYETTE

In the Matter of:

Denying the appeal of Peter and Helen Loewenstein upholding the Planning Commission LLR1-98 decision to deny a request for a three parcel lot-line revision, Burton Vista Ct., R-20 Zone, APN 236-090-012, 126-090-015, 239-100-002.	Resolution No. 69-98

RECITALS

A. On September 12, 1997, Peter and Helen Loewenstein ("Applicants") filed an application (LLR 1-98) requesting a three-parcel lot-line revision. The proposed site is located in the R-20 zoning district (LMC section 6-781 through 6-793).

B. The Planning Commission reviewed the application on March 19, 1998. After considering the information received at the hearing, the Planning Commission denied the request based on the following findings:

1. The proposed action would place a fifth lot and house within a City-approved subdivision that was restricted to four lots and four houses.

2. The proposed action would not be consistent with the city zoning because it would reduce the lot area of one proposed parcel to 1.07 acres, which does not comply with the lot area requirement of LMC sections 6-3104 and 6-3105(b), and would reduce the lot area of the other proposed parcel to

2.12 acres, which does not comply with LMC 6-3104.

3. The Commission expressed the opinion that the LLR process proposal in this case was a circumvention of the normal requirements of the subdivision process.

C. On March 23, 1998, Applicants appealed the Planning Commission's decision to the City Council.

D. The City Council held a public hearing on April 27, 1998. The City Council heard testimony and received evidence from the City staff and from the Applicants, and after consideration of the evidence submitted, directed staff to prepare a Resolution for consideration at the meeting of May 11, 1998. At the May 11th meeting, the Applicants and the City Council agreed to make the resolution effective upon expiration of a period which would permit Applicants to explore a suggestion by the Council that Applicants file a subdivision application. The Council thereupon adopted Resolution No. 43-98.

E. The Applicants did explore the filing of a subdivision application. After conferring with City staff and its own engineer, Applicants determined that they did not want to risk a denial of a subdivision application given the time and expense involved in such a proceeding and their belief that a lot line adjustment was the proper method to accomplish their goal.

F. Applicants have asked the City Council to amend Resolution No. 43-98 to make it effective upon adoption so that they may initial legal proceedings challenging the City Council's denial of the lot line adjustment.

G. In contemplation that a court will be called upon to review these proceedings, the City Attorney has drafted this revised resolution of denial to provide complete findings upon which the City Council's decision is clearly disclosed and to take into account some of the Applicant's comments and objections to the proposed adoption of the revised resolution.

H. The Council has considered the matter presented to it by the Applicant and the City Staff.

NOW, THEREFORE, the City Council of the City of Lafayette, California finds and determines as follows:

1. Applicants' appeal regarding a three-parcel lot-line revision is denied based upon the following findings:

   a. Government Code section 66412(d) authorizes a lot line adjustment under conditions when land taken from one parcel is added to an adjacent parcel but a greater number of parcels than originally existed is not created thereby. In approving a lot line adjustment, the City is limited in its review and approval to a determination of whether the resulting parcels will conform to City zoning and building ordinances. The City may not impose conditions or exactions on its approval except to conform to City zoning and building ordinances. The City may not require a tentative, parcel or final map.

   b. Applicants are the owners and residents of a 3.04 acre parcel, located in a four-lot subdivision that was approved in 1977 (MSL 7-77). The 3.04 acre lot is improved with a single family residence.

c. Applicants wish to use the lot line adjustment procedure to split off the rear portion of its 3.04 acre lot and combine that portion with a separate parcel, which Applicants have acquired, to create a fifth building lot.

d. One of the conditions of approval of the subdivision in which Applicants' lot is located is that there shall be no further subdivision of any of the four lots. An owner of a lot subject to this condition may seek to further subdivide its lot, but to do so must seek approval of a change in this condition. If the City changes the condition to permit the creation of additional lot(s), the owner is required to comply with the Subdivision Map Act (Gov't Code §§66410, et seq.) and the City's subdivision regulations.

e. The separate parcel that Applicants acquired is near, but not contiguous to, its subdivision lot and is located outside the subdivision. This separate parcel was originally part of a larger parcel owned by the Moraga Company. It was acquired by the East Bay Municipal Utility District (EBMUD) for use as a tank site in 1931. The tank site is a parcel 75 by 60 feet in area (4,500 sq. ft.). The documents from the files of EBMUD relating to the acquisition of the parcel by Applicants are attached to this resolution as Exhibit A.

f. The lot line adjustment proposed by Applicants requires that the boundaries of Applicants' lot and that of a neighboring lot within the subdivision be adjusted so that the tank site parcel becomes contiguous to

Applicants' lot. To accomplish this, a triangular parcel would be taken from a neighboring subdivision lot and added to Applicants' subdivision lot. This would make the tank site parcel contiguous to Applicants' subdivision lot. Upon completing this, the boundaries of the tank site parcel and Applicants' subdivision lot would be adjusted so that the original 3.04 acre lot would be divided such that the existing residence and surrounding area would comprise a 1.07 acre lot, rather than a 3.04 acre lot, and the tank site parcel would be combined with the remaining portion of the original 3.04 acre lot to comprise a 2.12 acre lot.

g. Approving this series of lot line adjustments would create two lots and result in a fifth building site within the subdivision where only four lots are approved for development. Applicant states that a fifth lot is not being created and that the subdivision will still consist of four lots because a portion of its subdivision lot is being removed and added to the tank site parcel. However, the building site for the proposed residence is not on the tank site parcel but is on the portion of the 3.04 acre subdivision lot that would be split off from it. This fifth lot would be served by the infrastructure and subdivision improvements constructed for the four lot subdivision. It is questionable whether the tank site parcel could be developed as an independent building site.

h. The regulation and control of the design and improvement of subdivisions within its boundaries is vested in the City (Gov't Code

§§66414, 66418, 66419). The approval of Applicants' lot line adjustment would deprive the City of the authority vested in it by the Subdivision Map Act. It would permit the Applicants to avoid the mandatory and discretionary requirements that are a part of the subdivision process though the use of the non-discretionary lot line adjustment process.

i. The City Council concludes that the Applicants' proposal would create an additional lot and is, therefore, a division of land within the meaning of Chapter 6-31 of the Lafayette Municipal Code. Applicants' 3.04 acre lot is "hillside land," as that term is defined in Lafayette Municipal Code (LMC) section 6-3103. As such, if it is to be divided into two parcels, it is subject to LMC section 6-3101 through 6-3108. These provisions specify the minimum lot area required for a building site on hillside land. In turn, the require lot area for a hillside lot depends upon the lot's average slope. The lot line adjustment proposed would not conform to City zoning because, based on their respective average slopes, the proposed 1.07 acre lot would not comply with the lot area requirement of LMC sections 6-3104 and 6-3105(b), and the proposed 2.12 acre lot would not comply with the lot area requirement of LMC section 6-3104.

2. This determination is a denial of the authority to use the lot line adjustment process. It is not a denial of the Applicants' right to apply for the creation of the lot proposed by following the City's subdivision regulations.

3. This resolution supercedes and rescinds Resolution No. 43-98, adopted on May 11, 1998. This resolution becomes effective upon its adoption.

PASSED AND ADOPTED by the City Council of the City of Lafayette at a meeting held on August 10, 1998 by the following vote:

AYES: Councilmembers Horn, Strauss, and Mayor Grodin

NOES: None

ABSENT: Councilmember Samson

ABSTAIN: Councilmember Tatzin

/s/ Anne Grodin
Mayor

ATTEST:

/s/ Susan M. Jusaitis
City Clerk

EXHIBIT A

(LOGO) *EAST BAY*
MUNICIPAL UTILITY DISTRICT

LYNELLE M. LEWIS
SECRETARY OF THE DISTRICT

July 13, 1998

Michael Henn, Planning Services Manager
City of Lafayette
P. O. Box 1968
Lafayette, California 94549-1968

Dear Mr. Henn:

In response to your July 6, 1998 letter request re information on the sale of property on Burton Vista Court to Mr. and Mrs. Loewenstein, enclosed are the following documents from the District's files:

1. Notice of Public Auction Option to Purchase for August 22, 1996;
2. Surplus Property Value Estimate; and
3. Memoranda from Stephen J. Boeri to Rebecca F. Lamoreaux, dated October 7, 1996, re: Sale of Surplus District Property, CC 212, Lafayette.

Please contact Stephen J. Boeri, Manager of Real Estates Services, at 287-1248, if you need further assistance.

Sincerely,

/s/ Lynelle M. Lewis
Lynelle M. Lewis
Secretary of the District

LML:mp
Enclosures
cc: Stephen J. Boeri
w:\ltr.hen

(LOGO)
EBMUD

NOTICE OF
PUBLIC AUCTION
OPTION TO PURCHASE
(Sealed Bid)

DATE:	~~Wednesday~~ [Thursday], August ~~21~~ [22], 1996
TIME:	~~1:00~~ [9:30] p.m.
PLACE:	East Bay Municipal Utility District Administration Building 375-11th Street, Oakland, CA 9th Floor Conference Room
OPTION PERIOD:	60 Days After the Acceptance and Approval of the Bid by the District's Board of Directors
OPTION DEPOSIT AMOUNT:	$2,500 *In the Form of Certified Check, Cashier's Check or Money Order (No Personal Checks)*
MINIMUM BID:	$13,500
PROPERTY LOCATION:	Burton Vista and Carlyle Terrace, Lafayette (See map on reverse)
FOR MORE INFO CONTACT:	Gayle Thomas East Bay Municipal Utility District 375 Eleventh Street Oakland, CA 94607-4204 (510) 287-1247 M-F 7:30 a.m. – 5:00 p.m.

PROPERTY INFORMATION

Size: Approximately 4500 Square feet
Assessor's Parcel No.: 239-100-002
Zoning: R-20 Residential
Utilities: There is no record access to the site; and there are no utilities to the site, but utilities are in the nearby streets.

The property is being sold "as is" and is subject to all title exceptions, restrictions, easements and reservations whether or not of record.

IT IS THE BUYER'S RESPONSIBILITY TO DETERMINE THE ACCEPTABLE USES OF THIS PROPERTY. [Title Report attached]

SEALED BID PROCESS

The minimum bid price is $13,500. Sealed bids will be accepted in the Real Estate Services Section of the East Bay Municipal Utility District, located on the 9th floor at 375-11th Street Oakland, CA 94607, until 1:00 p.m. on Wednesday, August 21, 1996, at which time they will be opened.

The Option to Purchase Agreement must be executed and returned with a *CASHIER'S CHECK, CERTIFIED CHECK, OR MONEY ORDER* in the amount of $2,500.

Bid opening will commence at 9:30 AM ~~1:00 p.m.~~ on the 9th floor of EBMUD. The highest qualified bid will be determined and accepted. Unaccepted bids will be returned by mail as addressed therein. The successful bidder's deposit is non-refundable.

BID ACCEPTANCE

Any acceptance of a bid by the person conducting the sale shall be subject to the acceptance and approval of the District.

BID REJECTIONS

The District reserves the right to reject any and all offers and waive any informality or irregularity in any offer or to accept any offer deemed in the best interests of the District, or to withdraw the property from the sale.

BIDDER DEFAULT

In the event that the high bidder fails to exercise his or her option within the Option Period or defaults in completion of the sale, the District may, at its discretion, offer the Option to the second highest bidder. If the second highest bidder accepts the offer, the deposit requirement and terms of Option to purchase shall be the same as stated in this notice of sale, except that the Option Period shall commence upon acceptance and approval by the District.

CLOSING TRANSACTION

Successful bidder will have the Option Period of 60 days after the District approves and accepts the bid to complete the transaction under the TERMS OF OPTION TO PURCHASE, attached hereto.

In the event any term or condition in the agreement conflicts with or violates any statutory requirements in the sale of public property, only that part or portion of this

agreement so conflicting shall be amended to conform with any applicable legal requirements at the time.

All District employees may bid to acquire surplus District property, except employees who have direct access to information not generally available to the public or who influences the purchase or sale of right-of-way or other real property.

THE INFORMATION CONTAINED HEREIN IS BELIEVED RELIABLE, BUT IS NOT GUARANTEED.

OPTION TO PURCHASE AGREEMENT

(SILENT BID)

For the purchase of the real property located between Burton Vista and Carlyle Terrace in Lafayette, California, and described in Exhibit "A" attached hereto and made a part hereof, the undersigned Optionee hereby agrees to the terms and conditions of option hereinafter set forth and further agrees to pay _____ DOLLARS ($) as full payment for the purchase of said property. A deposit in the amount of $2,500.00 is paid herewith and the balance in the sum of $_____ will be paid within the Option Period specified herein, namely 60 days after acceptance of this Agreement by the East Bay Municipal Utility District.

TERMS AND CONDITIONS

1. The Option Period shall commence on the first day following the date of the approval and acceptance of this Option by the District's Board of Directors. The

full purchase price shall be paid on or before expiration of the Option Period.

There may be circumstances beyond the control of the Optionee which prevent completion of the terms and conditions within the Option Period. Under these circumstances, East Bay Municipal Utility District may, at its discretion, provide for an extension of the Option Period if it is deemed in the best interests of East Bay Municipal Utility District. It is understood that the successful bidder acquires no right, title, interest or equity in or to said property until the deed is recorded.

2. The sale under this Option is subject to the approval of East Bay Municipal Utility District. The successful bidder may take possession when the deed from the East Bay Municipal Utility District has been recorded.

3. East Bay Municipal Utility District reserves the right to cancel the sale at any time prior to recording of the deed. In the event of cancellation of sale, all monies deposited shall be refunded without payment of interest.

4. The right, title and interest in the property to be sold shall not exceed that vested in East Bay Municipal Utility District, and the property is being sold subject to all title exceptions, restrictions, easements and reservations, whether or not of record. The successful purchaser may obtain a policy of title insurance at its own expense.

5. The Optionee shall pay all recording fees, documentary transfer taxes, or other real estate transaction taxes, or fees by whatever name known, including escrow fees or broker's commission, if any, and personal property sales taxes where applicable.

6. East Bay Municipal Utility District does not guarantee the condition of the property nor does it assume

any responsibility for the conformance to codes or permit regulations of the City and/or County in which the property is located. It is the BUYER'S RESPONSIBILITY to determine and comply with all building, planning and zoning regulations relative to the property and the uses to which it can be put. THE PROPERTY WILL BE SOLD ON AN "AS IS" BASIS.

Optionee hereby acknowledges reading and having read, hereby agrees to all terms, rights and remedies as set forth herein.

The property shall be conveyed by Grant Deed to: _____
(show full

_____

name(s))

_____

(show how title to be vested)

It is also agreed that all notices and services pertaining to matters arising in connection with this transaction may be made upon Optionee in person or by mail addressed to bidder at:

_____

(address)

_____

(phone)

OPTIONEE

_____

_____

Date: _____

EAST BAY MUNICIPAL DISTRICT

Bid accepted and approved:

By: _____
Stephen J. Boeri
Manager of Real Estate Services

Date: _____

SURPLUS PROPERTY VALUE ESTIMATE

Property Name: Lafayette Tank Site (CC-212)
APN: 239-100-002

Former District Use: Tank Site

Property Address: Burton Vista & Carlyle Terrace, Lafayette

Zoning: R-20 (20,000 SF minimum) General Plan: Residential

Best Use: Residential – Plottage to adjoining Landowner

Possible Hazardous Material (including underground tanks)
Yes ___ No _X_

Property Rights Appraised: Fee

Date Inspected: 5/1/96

PROJECT DESCRIPTION:
Fee Sale of .10 acres to adjoining property owner.

PARCEL DESCRIPTION:
Parcel is .10 acres, landlocked, gently sloping to the east. View of Burton Valley, several large oak trees. Nearest utilities are in St. Mary's and there is no easement serving this parcel.

VALUE ANALYSIS:
This 60' x 75' parcel cannot be developed independently as a single family residential lot as it has insufficient land area to meet the minimum lot requirement and is below the average normal standardized size and shape of other privately owned properties in the immediate neighborhood. There is no record access to the site and there are no utilities to the site but utilities are nearby. The most reasonable highest and best use is for assemblage with one

of the adjacent parcels as a pad area on a larger lot. This parcel is at the high end of a knoll, which when combined with adjacent property, would be well suited for a single family residence.

I have used comparable market data to estimate the value of buildable lots in the area. Assemblage parcels are typically discounted somewhat as there is limited market demand for such property. In this case, only the three adjacent properties can utilize this parcel. However, this property has excellent view potential and may be the most logical site for a single family residence when combined with adjoining property. For these reasons, the subject 4,500 s/f parcel has not been discounted but has been valued the same as surrounding property. Buildable lots sell for approximately $90,000 or $3.00-4.00/s.f. Therefore, the estimated value is $3.00-4.00/s.f. x 4;500 s.f. or $13,500-$18,000.

Recommended minimum bid: $13,500

/s/ Gayle Thomas _____ _____

APPRAISER-REAL ESTATE REPRESENTATIVE — DATE

The undersigned has reviewed and approved this estimate.

_____

MANAGER OF REAL ESTATE SERVICES

October 7, 1996

MEMO TO: Rebecca F. Lamoreaux, Manager of Customer and Community Services

FROM: Stephen J. Boeri, Manager of Real Estate Services /s/

SUBJECT: Sale of Surplus District Property, CC 212, Lafayette

RECOMMENDED ACTION

Approve the sale of surplus District property CC-212 located between Carlyle Terrace and Burton Vista Court in Lafayette (see attached map), to an adjacent property owner.

DISCUSSION

The District acquired this .10 acre site in 1931 from the Moraga Company as a tank site to serve their small subdivision (there is no evidence of monetary consideration). In 1942, a new, larger tank was constructed on property near this tank and this tank was removed from service. This property has not been used for District operations since then.

The District declared the property surplus in 1989. On August 22, 1996, the property was offered for sale by sealed bid to the three adjacent property owners. The minimum bid was set at $13,500. The highest bid received was $13,500 from Peter and Helen Loewenstein.

EVALUATION

The City of Lafayette found the proposed property sale to be in conformance with its general plan, strongly recommending sale to an adjacent property owner due to its size. The parcel does not have record access and, due to its size (under 10,000 square feet), the District was not required to offer the property for sale to other public agencies. A Notice of Exemption was posted.

District staff valued the property in a range of $13,500 to $18,000 and established a minimum bid of $13,500 for the purposes of auction. Three adjacent property owners were sent Notices of Public Auction by Sealed Bid and also letters inviting their participation. One bid was received from one party, with a high bid of $13,500. The successful bidder has deposited $2,500 with the District and has 60 days (until October 22, 1996) to pay the balance. This sale does not require Board approval. Per the signature authority memo dated August 26, 1996, (copy attached) the Manager of Customer and Community Services has authority to dispose of fee title in values under $20,000.

SJB:GT:la

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA
HON. RICHARD L. PATSEY, JUDGE
DEPARTMENT 13

PETER G. LOEWENSTEIN and
HELEN LOEWENSTEIN,

Plaintiffs and Petitioners,

vs. Case No. C98-03977

CITY OF LAFAYETTE, etc., et al.,

Defendants and Respondents.

ORDER GRANTING PETITION FOR WRIT OF MANDATE

(Filed Mar. 9, 1999)

Having considered the oral argument of counsel and [having /s/ KLP] reviewed again the administrative record, I am satisfied the tentative ruling denying the petition is in error. Accordingly, I grant the petition, order Respondent City of Lafayette to set aside its decision of August 10, 1998, and order Respondent to reconsider Petitioners' lot line application.

I conclude, given this administrative record, that granting the lot line adjustment would not violate any zoning, building or slope density ordinances or regulations of Respondent City of Lafayette. Thus, whether the standard of review be substantial evidence or arbitrariness, Respondent City of Lafayette's denial has no support in the administrative record.

I disagree with Respondent's view that the exemption under Govt. Code Section 6641(d) is inapplicable here. By the plain language of the section a ". . . greater number of

parcels than originally existed is not. . . ." created by the lot line adjustment. Respondent's argument that I must read into the statute a further restriction that a greater number of parcels may not be created within an existing subdivision is not supported by the legislative history of Section 6641(d), the plain meaning of the section of this record.

IT IS SO ORDERED THIS
9TH DAY OF MARCH, 1999.

/s/ Patsey
RICHARD L. PATSEY
JUDGE OF THE SUPERIOR COURT

Collette Stone, Esq. (SBN 129773)
BOORNAZIAN, JENSEN & GARTHE
1500 Newell Ave., 6th Floor
Walnut Creek, CA 94596
Telephone (510) 934-8400

David J. Bowie (SBN 50167)
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Telecopier (925) 939-5392

Attorneys for Plaintiffs Peter and Helen LOEWENSTEIN

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF CONTRA COSTA

PETER G. LOEWENSTEIN and HELEN LOEWENSTEIN, Petitioners and Plaintiffs, vs. CITY OF LAFAYETTE, et al., Respondents and Defendants.	Case No. C98-03977 Trial Date: TBA Dept: Dept 13 PEREMPTORY WRIT OF MANDATE

THE PEOPLE OF THE STATE OF CALIFORNIA

To: Respondent, THE CITY OF LAFAYETTE, a Municipal Corporation.

On March 9, 1999, the Honorable Richard L. Patsey, Judge of this Court, entered an Order Granting the Petition for Writ of Mandate heretofor filed by PETER G. LOEWENSTEIN and HELEN LOEWENSTEIN, Petitioners.

Notice of Entry of said Order was filed and served on or about March 15, 1999.

YOU ARE HEREBY COMMANDED upon receipt of this Writ to set aside your decision of August 10, 1998, in the administrative proceedings entitled "In the Matter of: Denying the Appeal of PETER and HELEN LOEWENSTEIN upholding the Planning Commission LLR1-98 Decision to Deny a Request for a Three Parcel Lot-Line Revision, Burton Vista Court, R-20 Zone, APN 236-090-012, 236-090-015, 239-100-002, which proceedings are hereby remanded to you, to reconsider your action in the light of this Court's Order Granting Petition for Writ of Mandate, in which this Court made the following determinations:

A. That granting the lot line revision requested by Petitioners would not violate any zoning, building, or slope density ordinances or regulations of Respondent, CITY OF LAFAYETTE, such that the denial thereof was without support in the Administrative Record; and

B. Government Code Section 66412(d) is inapplicable to these circumstances by virtue of the plain language of that statute that a ". . . greater number of parcels than originally existed is not . . ." created by Petitioner's lot line revision.

YOU ARE HEREBY COMMANDED to take any further actions specifically enjoined on you by law; but nothing in this Writ shall limit or control the discretion legally vested in you.

YOU ARE FURTHER COMMANDED to make and file a return to this Writ on or before 60 days from date hereof setting forth what you have done to comply.

SEAL

K. TORRE,
Clerk of the Superior Court

By D. DOW, Deputy Clerk

LET THE FOREGOING WRIT ISSUE,

DATED: 11/3/99

By /s/ Patsey
Honorable Richard J. Patsey
Judge of the Superior Court

APPROVED AS TO FORM

/s/ Charles J. Williams
CHARLES J. WILLIAMS,
City Attorney, City of Lafayette

Charles J. Williams, SBN 026659
Charles J. Williams, APC
Muir Parkway
1330 Arnold Drive, Suite 149
Martinez, California 94553
Telephone: (925) 228-3840
Facsimile: (925) 228-1703

Attorney for Respondent and Defendant
CITY OF LAFAYETTE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

PETER G. LOEWENSTEIN and HELEN LOEWENSTEIN, Petitioners and Plaintiffs, v. CITY OF LAFAYETTE, et al., Respondents and Defendants.	Case No. C98-03977 **RETURN TO PEREMPTORY WRIT OF MANDATE** (Filed Jan. 19, 2000)

To: THE SUPERIOR COURT OF THE STATE OF CALIFORNIA:

Respondent, CITY OF LAFAYETTE, makes the following return to the Peremptory Writ of Mandate issued in this action:

At its regular meeting held on January 10, 2000, the City Council of the City of Lafayette directed the City Attorney to file the City's Notice of Appeal of the judgment granting the peremptory wit of mandate upon entry of a final judgment that disposes of all causes of action between the parties. (See *Morehart vs. County of Santa*

Barbara (1994) 7 C4th 725, 29 CR2nd 804; *Nerhan vs. Stinso Beach County Water District* (1994) 27 CA4th 536, 33 CR2nd 10.

Dated: January 14, 2000

/s/ Charles J. Williams
Charles J. Williams, APC
Charles J. Williams
Attorney for Respondents
and Defendants
CITY OF LAFAYETTE

IN THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR THE
COUNTY OF CONTRA COSTA

PETER G. LOEWENSTEIN
and HELEN LOEWENSTEIN,

Petitioners and Plaintiffs,

vs.

CITY OF LAFAYETTE,
et al.,

Respondents and Defendants /

NO. C98-03977

DECISION AND
ORDER

RE: RIPENESS

(Filed Jan. 27, 2000)

I have considered the briefs and arguments of the parties concerning ripeness.

Defendant contends the question whether it has taken Plaintiffs' property is not ripe for adjudication since Plaintiffs have not established that Defendant has arrived at a final position regarding development of Plaintiffs' property. In particular, Defendant contends: 1) That Plaintiffs can proceed by application under the Subdivision Map Act; 2) That Plaintiffs may be able to develop the tank site independently of their residential parcel.

I reject Defendant's arguments. The declaration of Ms. Stone satisfies me that it would be futile for Plaintiffs to proceed with an application under the Subdivision Map Act. Defendant's own planning staff has made that clear. Further, as the Stone declaration also shows, there is no reasonable possibility that Plaintiffs' can develop their landlocked tank site independent of their residential parcel.

I order this case set for a status conference before Judge Rivera on February 28, 2000 at 8:30 a.m. at which time a trial date can be set on the "taking" issue.

DATED: JAN 27 2000.

/s/ Richard L. Patsey
RICHARD L. PATSEY
JUDGE OF THE SUPERIOR COURT

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CITY OF LAFAYETTE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

PETER G. LOEWENSTEIN and HELEN LOEWENSTEIN, Petitioners and Plaintiffs, v. CITY OF LAFAYETTE, a Municipal Corporation, and DOES 1 through 50, inclusive, Respondents and Defendants.	Case No. C98-03977 **ORDER RE TENTATIVE RULING** (Filed Apr. 24, 2000)

This matter came on for hearing on April 11, 2000, before the Honorable Maria Rivera, Judge of the Superior Court, Department 7, following the Court's tentative ruling on April 10, 2000 relating to the issue of whether or not the City is liable to the Plaintiffs in inverse condemnation.

Following the Court's tentative ruling, Charles J. Williams, Esq. requested argument; thereafter he appeared on behalf of Defendant, CITY OF LAFAYETTE, and David Bowie, Esq. appeared on behalf of Petitioners

PETER G. LOEWENSTEIN and HELEN LOEWENSTEIN.

The Court, having considered the points and authorities presented by Petitioners and Respondents, and having considered the arguments of both Respondents and Petitioners on the issue of inverse condemnation liability, it is found, determined and ordered that the Court's tentative ruling stands as follows:

1. The Court cannot find on the record presented that the City's action was so objectively unreasonable that it was made for no other reason than to delay the proposed project. To the contrary the City's decision, though erroneous, was rational and, as stated by Judge Patsy, not arbitrary or capricious. Nor can a delay of a little over two years for processing the application, the administrative appeals and this litigation be considered an unreasonable delay that results in a taking. As stated in *Landgate, Inc. vs. California Coastal Commission* (1998) 17 C4th 1006, 73 CR2nd 841, the "normal" permit process includes the period in which the property owner must litigate over threshold questions that must be resolved relating to the underlying project. No case cited holds that a two year time delay for resolving this kind of threshold issue constitutes an unreasonable delay;

2. Regarding the remaining theory for taking, described by the City as the ad hoc balancing test, whether or not there has been a taking cannot be determined on the existing record because there are disputed issues of fact. Further, the determination of whether there has been a taking under *Penn Central Transportation Co. vs. City of New York* (1978) 438 US 104 and *Kavanau vs. Santa*

Monica Rent Control Board (1997) 16 C4th 761, 66 CR2nd 681 requires additional evidence that ~~must~~ is be inextricably intertwined with issues of valuation. Accordingly, the remaining issues for trial are:

(1) whether there has been a "regulatory taking", and if so

(2) the amount of "just compensation"

The issue of whether or not there has been a regulatory taking is set for an evidentiary hearing on June 12, 2000.

Dated: April 18, 2000

/s/ MARIA P. RIVERA
The Honorable Maria Rivera
Judge of the Superior Court

Approved as to Form:

/s/ David J. Bowie — 4/12/00
David J. Bowie, Esq. — Date
Attorney for Petitioners/Plaintiffs
PETER G. LOEWENSTEIN and
HELEN LOEWENSTEIN

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF CONTRA COSTA

PETER G. LOEWENSTEIN and HELEN LOEWENSTEIN, Plaintiffs, vs. CITY OF LAFAYETTE, Defendant.	No. C98-03977 NOTICE OF RECUSAL (Filed May 30, 2000)

Upon due reflection and consideration, the Court has decided it must recuse itself from further proceedings in this matter. The case is assigned for all purposes to Department 18. The trial date of June 12 is confirmed.

Dated: May 30, 2000

/s/ Maria P. Rivera
Judge of the Superior Court

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF CONTRA COSTA

PETER G. LOEWENSTEIN and HELEN LOEWENSTEIN, Petitioners and Plaintiffs, vs. CITY OF LAFAYETTE, et al., Respondents and Defendants.	Case No. C98-03977 ~~[PROPOSED]~~ STATEMENT OF DECISION (Filed Jul. 3, 2000)

I

INTRODUCTION

This subject action was filed on September 24, 1998. In their pleadings, the Plaintiffs sought administrative and ordinary mandamus as well as declaratory relief. The filed complaint also sought to recover damages

based upon the Takings Clause of the Fifth Amendment as incorporated against the State by the Fourteenth Amendment of the United States Constitution whereby compensation to a land owner was required under those circumstances wherein a regulatory ruling of state or municipal agencies has denied the owner the economically viable use of his land.

On March 9, 1999, this Court, the Honorable Richard L. Patsey, Judge, presiding, issued an Order Granting Petition for Writ of Mandate. Based on the Administrative Record offered into evidence, the Court concluded that granting the lot line adjustment which Plaintiffs had sought did not violate any zoning, building or slope density ordinances or regulations of the Respondent City of Lafayette. Thus, whether the standard of review was substantial evidence or arbitrariness, the Respondent City's denial was without support in the Administrative Record. The Court specifically rejected the Respondent City's argument that the plain language of Government Code Section 66412(d) must be expanded to include a restriction that a greater number of parcels not be created within an existing subdivision by a lot line adjustment pursuant to said statute. A Peremptory Writ of Mandate was subsequently issued; in its return to the Writ the Respondent City declined to reconsider its decision and instead elected to appeal the Court's determination.

Subsequent to issuance of the aforesaid Peremptory Writ of Mandate, the remaining issues posed by the Plaintiffs' Takings claim were contested by means of a series of motions made by the Respondent, City of Lafayette.

On January 27, 2000, this Court, the Honorable Richard L. Patsey, Judge, presiding issued a Decision and Order re Ripeness. That decision and Order followed a motion filed by the Respondent City of Lafayette in which it contended that the Plaintiffs' Takings claims were not ripe for adjudication on the grounds of Plaintiffs' alleged failure to establish that the Respondent City of Lafayette had arrived at a final position regarding development of Plaintiffs' property. In particular, the Respondent City contended that Plaintiffs could proceed by application under the Subdivision Map Act to develop their property or that they might have been able to develop their subject property independently of the lot line adjustment they sought from the City pursuant to Government Code Section 66412(d). In the subject Decision and Order, the Court specifically found that it would have been futile for the Plaintiffs to have proceeded with an application under the Subdivision Map Act; in addition, the Court factually found that there was no reasonable possibility that Plaintiffs could develop their landlocked real property parcel independent of the lot line adjustment they sought through the City of Lafayette pursuant to Government Code Section 66412(d). The Decision and Order of Judge Patsey assigned the subject case to the Honorable Maria Rivera, Judge of this Court, for the setting of a trial date on Plaintiffs' Takings Issues.

On April 24, 2000, this Court, the Honorable Maria Rivera, Judge presiding, issued an Order in which she held that a delay of approximately two years in processing Plaintiffs' Lot Line Adjustment Application, the administrative appeals, and this litigation might not be considered an unreasonable delay which, in and of itself, might result

in a Taking pursuant to *Landgate Inc. vs. California Coastal Commission* (1998) 17 C 4th 1006. In that same Order, Judge Rivera set for evidentiary hearing and trial the issues as to whether or not there had been a taking of Plaintiffs' property pursuant to *Penn Central Transportation Company vs. City of New York* (1978) 438 U.S. 104 and *Kavanau vs. Santa Monica Rent Control Board* (1997) 16 C 4th, 761 and, if so, the amount of "just compensation" due Plaintiffs. The issues of a "taking" and the amount of "just compensation" due were bifurcated for purposes of trial by Order of this Court, the Honorable William M. Kolin, Judge, presiding, with the stipulation of counsel for the parties.

A Statement of Decision was requested by the parties and has been prepared based upon the Court's tentative decision placed of record upon conclusion of the "Takings" evidence and after oral argument on the "Takings Issue" and then after submission of the case following of evidence and argument as to the "just compensation" issue. The parties, through their respective attorneys, waived a jury as to the second bifurcated issue of "just compensation". A Statement of Decision is intended to set forth an explanation of the factual and legal basis of the decision as to the principal controverted issues. Code of Civil Procedure Section 632; Rules of Court, Rule 232.

Trial of this subject case commenced June 12, 2000, in Department 18 of this Court before the Honorable William M. Kolin, Judge presiding. The Plaintiffs were represented by and through their attorneys, David J. Bowie and Colette Stone. The Respondent, City of Lafayette, was represented by its attorney, Charles J. Williams. Trial was concluded June 14, 2000.

II

THE CITY'S LIABILITY FOR A "TAKING" OF PLAINTIFF'S REAL PROPERTY

Since the 1970's, the use of inverse condemnation to challenge government regulation of property has been explosive in California and elsewhere. A regulatory taking is often referred to as an unreasonable exercise of a public entity's police power. The United States Supreme Court has recognized that a regulation of property that "goes too far" may effect a taking of that property, though its title remains in private hands. *Penn. Coal Co. vs. Mahon* (1922) 260 US 393, 415.

To escape liability for its interference with private property rights, a public entity's regulatory action must be "necessary" for the general good of the public. *Keystone Bituminous Cole Assn vs. DeBenedictis* (1987) 480 U.S. 470, 503. There is no set formula for determining when justice and fairness require that economic injury caused by regulatory action be compensated. As stated in *Penn Central Transportation Company vs. City of New York* (1978) 438 U.S. 104, 124, these cases are essentially "ad hoc" inquiries."

A takings claim based on a legal theory that a regulation has a proper public purpose but imposes so severe a burden on the individual property as to amount to a taking of private property for public use without prior compensation was allowed in *Lucas vs. South Carolina Coastal Council* (1992) 505 US 1003. In *First English Evangelical Lutheran Church vs. Los Angeles County* (1987) 482 U.S. 304, an ordinance which prohibited the reconstruction of buildings in an interim flood protection

area constituted a temporary taking for which just compensation was due.

In *Kavanau vs. Santa Monica Rent Control Board* (1997) 16 C 4th, 761, the California Supreme Court acknowledged two separate categories of takings: First, a permanent physical invasion of property no matter how slight requires payment of just compensation; Second, a regulation that deprives the project property owner of all economically beneficial or productive use of land effects a taking requiring just compensation. As noted in *Kavanau*, if a taking is regulatory in nature, then the criteria set forth by the United States Supreme Court in the *Penn Central* case must be considered: the economic impact of regulation on the claimant; the extent to which a regulation interferes with distinct investment-backed expectations; and the character of governmental action particularly if the regulation was or is reasonably necessary to effect a substantial public purpose.

In determining whether or a particular regulatory action advances a substantial governmental purpose, "The proper inquiry is not into the subjective motive of the governmental agency, but whether there is, objectively, sufficient connection between the land use regulation in question and a legitimate governmental purpose so that the latter may be said to substantially advance the former." "*Landgate Inc. vs. California Coastal Commission* (1998) 17 C 4th 1006" (FN 6a). The Supreme Court further indicated the proper inquiry to be, "thus, we must determine not whether a sinister purpose lurked behind the commission's decision, but rather whether the development restrictions imposed on the subject property substantially advance some legitimate state purpose so as to justify the denial of the development permit."

The statutory authority for lot line adjustments is found in Government Code Section 66412(d). The statute was construed in the case of *San Dieguito Partnership vs. City of San Diego* (1992) 7 Cal App 4th, 748. The Court framed the issue in the *San Dieguito* case in identical fashion to the issue posed by this subject case. "The question is whether a particular reconfiguration of the parcels is a lot line adjustment between two or more existing adjacent parcels, where the land taken from one parcel is added to an adjacent parcel, and where a greater number of parcels than originally existed is not thereby created . . . If the reconfiguration of the parcels fits this definition, it is not subject to the Subdivision Map Act, (SMA § 66410") *Id* at 750. In footnote 13 of the *San Dieguito* decision, the Court noted, "In light of the clear statutory language, we cannot accept the City's position that it may require a subdivision map based on its own finding 'the lot line adjustment process is not appropriate', apparently by any standard it chooses." *Id* at 760.

As in the *San Dieguito* case, Respondent City of Lafayette deemed the lot line adjustment process inappropriate in the context of Plaintiffs' real property. That decision was reached through application of a standard which was not and is not countenanced either by the lot line adjustment statute, Government Code Section 66412(d), or the *San Dieguito* case. The City of Lafayette was well aware of the statutory procedure for lot line adjustments as it acknowledged in testimony of its own witnesses that hundreds of lot line adjustments had been routinely processed over a period of at least 16 years by a single employee without denial save and except the subject lot line adjustment application filed by Plaintiffs.

As found by Judge Patsey and confirmed through testimony and documentation presented during trial of this cause, the impact of the Respondent City's regulatory action taken in denial of Plaintiffs' lot line adjustment application was to deny to Plaintiffs substantially all economically viable use of their property. The preponderance of the evidence indicated that Plaintiffs could not develop their land locked real property parcel in the absence of Respondent City's approval of their lot line adjustment application; without a lot line adjustment the property was and is without market value as only three adjoining land owners might have any interest in the purchase thereof, and of those three only Plaintiffs had expressed interest in the property and purchased it only with a view toward a lot line adjustment rendering the property developable. In short, in the face of the Respondent City's regulatory action of denial of a lot line adjustment, the subject property was and is without any economic value at all.

The preponderance of the evidence offered during trial indicates that the Plaintiffs acquired the subject real property with distinct investment-backed expectations. Those investment-backed expectations were that they might combine property from the preexisting residential lot with the subject real property through the lot line adjustment process thereby creating a residential building lot. Those investment backed expectations were reasonable in that both the East Bay Municipal Utility District as seller to Plaintiffs of their subject parcel and the Respondent City of Lafayette acknowledged the propriety of the sale of the subject lot to an adjoining land owner so that such adjoining land owner might create a buildable lot through the lot line adjustment or similar process.

The regulatory action undertaken by the City of Lafayette in denial of Plaintiffs' Lot Line Adjustment Application was unrelated to any substantial public purpose. The subject lot line adjustment proposed by Plaintiffs was essentially the same type of lot line adjustment sanctioned by the Court of Appeal in the *San Dieguito* case, as it construed the language of Government Code Section 66412(d) to severely curtail the extent of local agency involvement in the review of lot line adjustments and application of standards and exactions. The City of Lafayette failed to offer any credible evidence of any substantial governmental purpose which was furthered by its regulatory action of denial of Plaintiffs' Lot Line Adjustment Application. In fact, approval of the lot line adjustment proposal in this case would have actually furthered a substantial governmental purpose of converting a former legal, but non-conforming lot, into a legal and conforming lot. The City's own witness, Michael Henn, acknowledged that of hundreds of lot line adjustments, only this subject application was actually denied by the Respondent City. The Court specifically finds Mr. Henn's offered testimony regarding the character of governmental action not to be credible in view of the totality of his testimony indicating that over 16 years and out of more than two hundred lot line adjustments only Plaintiffs' lot line adjustment was denied.

An analysis of the three significant factors set forth by the United States Supreme Court in the *Penn Central* case based on the evidence and comments noted above, leads to the conclusion that a taking of Plaintiffs' real property has occurred for which just compensation is due. As a part of this Court's analysis, it has made the following specific factual findings:

a. That Plaintiffs purchased their property with reasonable investment-backed expectations that it could be rendered a buildable lot through the lot line adjustment process.

b. That the economic impact upon Plaintiffs of Respondent City of Lafayette's regulatory action was and is to have denied to Plaintiffs all economically viable use of their property

c. That the City's regulatory action failed to advance any legitimate state interest and, indeed, involved the application by the City of some arbitrary standard that a lot line adjustment was inappropriate in Plaintiffs' case in direct conflict with the plain statutory language of Government Code Section 66412(d) and the findings and holdings of the *San Dieguito* case.

III

PLAINTIFFS ARE ENTITLED TO JUST COMPENSATION

The Court, having found that a taking of Plaintiffs' property has occurred, has duly considered the evidence offered on the issue of "just compensation". In this respect, the Court has relied upon the expert opinion testimony of Plaintiffs' duly qualified valuation expert, Mr. James Everett. The Court has also considered the only evidence on the subject offered by the Respondent City of Lafayette: to wit, a portion of the Administrative Record which includes a written appraisal comment by an appraiser for the East Bay Municipal Utility District. Having weighed the evidence offered by the Respondent City and having concluded that no expert testimony was adduced contrary

to Mr. Everett's testimony during the course of the case, the Court finds the just compensation due Plaintiffs for the taking of their property to be $611,666.66.

CONCLUSION

Based upon the foregoing Statement of Decision, this Court finds that a compensible taking of Plaintiffs' property has occurred and that Plaintiffs are entitled to a Judgment inclusive of accrued interest to and including the date of trial in the sum of $611,666.66 together with litigation costs and expenses pursuant to CCP Section 1036.

Dated: 7/3/00

/s/ William M. Kolin
The Honorable William M. Kolin,
Judge of the Superior Court

SUPERIOR COURT
COUNTY OF CONTRA COSTA
DEPARTMENT 18
JUDGE WILLIAM M. KOLIN

REPORTER: D. HOLLAND DATE: 08/04/00

PETER G LOEWENSTEIN
PLAINTIFF(S)

VS.

CASE NO. MSC98-03977

CITY OF LAFAYETTE
DEFENDANT(S) MINUTE ORDER

****

PROCEEDINGS: SPECIAL SET HEARING RE: OBJECTIONS TO THE PROPOSED STATEMENT DECISION SET BY JUDGE KOLIN AT REQUEST OF CHARLES WILLIAMS,

CAUSE CALLED FOR HEARING BEFORE JUDGE WILLIAM M. KOLIN

COUNSEL: DAVID BOWIE FOR PLAINTIFF present in Court

COUNSEL: CHARLES WILLIAMS FOR DEFENDANT present in Court

MATTER ARGUED

COURT NOW RULES:

The court has considered objections of defendant, City of Lafayette to the Statement of Decision. The court hereby overrules those objections. the court has also reviewed and considered the reporter's transcript of the

6/14/00 proceedings. The court notes it was not previously submitted or attached to any of the documents filed by the parties.

The court finds that Statement of Decision generally comports with the reporter's transcript. However, the court orders the transcript to be appended to the Statement of Decision as court exhibit #A, and by such attachment will be made part of the Courts' Statement of Decision.

Counsel for planitiffs Loewenstein shall prepare an amended Statement of Decision as agreed in open court, and to prepare judgment in accord with the courts' ruling.

Date: 08/04/00 BY /s/ J. Espy
J. ESPY, Deputy Clerk

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA
BEFORE THE HONORABLE WILLIAM M. KOLIN
DEPARTMENT 18

PETER G. LOEWENSTEIN and HELEN LOEWENSTEIN, Plaintiffs,	)	
vs.	)	No. C98-03977
CITY OF LAFAYETTE, a Municipal Corporation, and DOES 1 through 50, inclusive, Defendants.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JUNE 14, 2000

APPEARANCES

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Reported By: DINA HOLLAND, C.S.R., R.P.R.

Official Court Reporter, Certificate No. 9693

[3] WEDNESDAY, JUNE 14, 2000 AFTERNOON SESSION

PARTIAL

PROCEEDINGS

THE COURT: All right. We're back on the record on Loewenstein versus City of Lafayette, and I have reviewed all of the materials in the case.

This case has somewhat of a tortured history, to say the least, leading up to the issues that you're asking the Court to consider today. I also noticed somewhat of a

disturbing trend that the last two judges immediately recused themselves or retired immediately after hearing an issue in the case.

Nevertheless, my review of the case shows as follows: This is not meant to be an exhaustive analysis, and the Court intends to write a Statement of Decision, so bear with me if it is, nevertheless, somewhat lengthy.

As I understand it, the original complaint filed by plaintiffs on September 24th, '98 stated causes of action for Petition for Writ of Mandamus and for Declaratory Relief which included the current issue before the Court on inverse condemnation and taking.

As the parties pointed out in their briefs, the plaintiffs sought a Peremptory Writ of Mandate commanding the City to set aside their decision denying plaintiffs' lot line adjustment. Judge Patsey granted [4] the Writ of Mandate and entered a Peremptory Writ of Mandate on November 3rd of '99 remanding the lot line adjustment proceeding to the City for reconsideration. And at that point, I understand the City decided to file a return indicating its intent to appeal the judgment.

And then the matter was set for trial, as I understand it, somewhere, I believe, August 30th of '99. And then there was a bifurcation of sorts. Judge Patsey bifurcated the issues for trial, and the first issue bifurcated was defendants' claim that the action was not ripe for decision. Judge Patsey then entered a decision, a written decision concerning ripeness January 27th, 2000. I'm going to read it, other than the last line, because I think it's important.

"I have considered the briefs and arguments of the parties concerning ripeness.

Defendant contends the question whether it has taken Plaintiffs' property is not ripe for adjudication since Plaintiffs have not established that Defendant has arrived at a final position regarding development of Plaintiffs' property. In particular, Defendant contends: 1) That Plaintiffs can proceed by application under the Subdivision Map Act; 2) That Plaintiffs may be able to develop the tank site independently of their residential parcel.

I reject Defendants' arguments. The declaration of Ms. Stone satisfies me that it would be futile for Plaintiffs to proceed with an application under the [5] Subdivision Map Act. Defendants' own planning staff has made that clear. Further, as the Stone declaration also shows, there is no reasonable possibility that Plaintiffs can develop their landlocked tank site independent of their residential parcel."

Then, thereafter, Judge Patsey retired, and I assume it's not because of this case. And the case was then assigned to Judge Rivera on the second issue posed by the parties, that is, whether the taking could have occurred by regulatory action as a matter of law.

Now, I've read her tentative decision which is April 24th, 2000, and I'm not sure that that addresses the issue which I think the parties have posed in the papers. But in any event, it is also important for the record for me to read her ruling in pertinent part.

"The Court cannot find on the record presented that the City's action was so objectively unreasonable that it was made for no other reason than to delay the proposed project. To the contrary, the City's decision, though erroneous, was rational and, as stated by Judge Patsey – who she misspelled his name – not arbitrary or capricious. Nor

can a delay of little over two years for processing the application, the administrative appeals, and this litigation be considered an unreasonable delay that results in a taking. As stated in *Landgate, Inc. v. California Coastal Commission* (1998) 17 Cal.4th 1006, the 'normal' permit process includes the period in which the property [6] owner must litigate over threshold questions that must be resolved relating to the underlying project. No case cited holds that a two-year time delay for resolving this kind of threshold issue constitutes an unreasonable delay."

The second issue or the second paragraph: "Regarding the remaining theory for taking described by the City as the ad hoc balancing test, whether or not there has been a taking cannot be determined on the existing record because there are disputed issues of fact. Further, the determination of whether there has been a taking under *Penn Central Transportation v. City of New York* (1978) 438 US 104 and *Kavanau v. Santa Monica Rent Control Board* (1997) 16 Cal.4th 761 requires additional evidence that is inextricably intertwined with issues of valuation.

Accordingly, the remaining issues for trial are: (1) whether there's been a 'regulatory taking,' and if so, the amount of 'just compensation.'"

Thereafter, this trial began on June 12th. The evidence concluded today, June 14th. The Court, on its own motion and I believe without objection by the parties, bifurcated the issues of liability and damages. The Court heard the evidence, read the briefs of the parties and the entire file.

As I understand, the issue, as framed by Judge Rivera, is essentially whether the governmental regulation under the police power can be so restrictive [7] as to

amount to an uncompensated taking of property. The answer in general is yes; there can be such a taking.

The next question which is more specific to this case is whether such an uncompensated taking of property has occurred in this case. And based on the evidence, the answer is also yes; I believe there was a taking in this case.

First, I want to point out that although a relative newcomer to the case, looking at *San Dieguito* – that's D-I-E-G-U-I-T-O – *Partnership v. City of San Diego* 7 Cal.App.4th 798 (1992), I believe Fourth District Court case – yes, Fourth District, seems on the surface and also after further reading to be indistinguishable in my opinion from the circumstances in that case. That case also involved discussion of Government Code 66412 subsection (d). The Court framed the issue in that case, and I think it is the same issue in this case. "The question is whether a particular reconfiguration of the parcels is a lot line adjustment between two or more existing adjacent parcels, where the land taken from one parcel is added to an adjacent parcel, and where a greater number of parcels than originally existed is not thereby created. If the reconfiguration of the parcels fits this definition, it is not subject to the Subdivision Map Act, SMA 66410."

The court also addressed I think an issue that I [8] believe that was raised by Mr. Williams in his closing argument. You read an excerpt of an issue, a law and motion issue attributed to Judge Patsey about minor lot line adjustments and his analysis of 66412(d). It appears at 756 of *San Dieguito Partnership* that that court at least addressed that particular issue in note two stating that: "It is especially noteworthy that the statutory language

does not contain the word, quote, minor, end quote, or any other words conveying the notion of a limitation of the number or size or parcels that may be affected by a lot line adjustment under its provisions comma so long as a, quote, a greater number of parcels than originally existed is not thereby created, end quote."

And in that case, they said there's no question the lot line adjustment under consideration comports with the no greater number parcels element.

The court also in note 13, which I thought was an interesting issue in addressing the legislative change to that statute and Amicus curiae brief, the court made a note that – concerning I think some of the tangential issues that were raised in this case about the reasons – at least the stated reasons or implied statement of reasons for denial of the Loewensteins' request for a lot line adjustment. And in the last sentence of note 13, the court says, "In light of the clear statutory language, we cannot accept the City's position that it may require a subdivision map based on [9] its own finding, quote, the lot line adjustment process is not appropriate, end quote, apparently by any standard it chooses."

And I think that's what has occurred here. The case of – also, where the – on page 760 talking about the regulatory function of the City of Lafayette as the approving agency, although they were talking about approving agency in general in that 760 of *San Dieguito* quote: "Thus. the regulatory function of the approving agency is strictly circumscribed by the Legislature in a lot line adjustment, with very little authority as compared to the agency's function and authority in connection with a subdivision. In other words, the agency is not to deal with

a lot line adjustment in a way similar to the way it deals with the subdivision. Certainly, when the lot line adjustment is within the language of the first sentence of the statute, the agency is not authorized to turn down a lot line adjustment approval request on the ground asserted here, that the lot line adjustment is a subdivision," which I think is also the situation here.

The case of *Landgate* which Judge Rivera quoted I think is also instructive on the issues that were also raised in trial if I can find that. It's *Landgate* at 17 Cal.4th 1006, 1022. In that case, the Supreme Court overruled the Court of Appeal decision concerning trying to divine the true motivation for the Commission's decision to deny a developmental permit, and I think [10] it's important to note because there was a lot of attempts I think in different ways to divine the intent or thinking of the City or the Planning Commission in this case in connection with the 19 – 1977 subdivision document at page 56 of Exhibit 1-A.

In that case, the Supreme Court at note (6a) states, "The proper inquiry is not into the subjective motive of the governmental agency, but whether there is, objectively, sufficient connection between the land use regulation in question and a legitimate governmental purpose so that the latter may be said to substantially advance the former." And it goes on to indicate essentially that the Court is not to divine the subjective intent of the decisionmakers.

Court also indicates, "Thus, we must determine not whether a sinister purpose lurked behind the Commission's decision, but rather whether the development restrictions imposed on the subject property substantially advance some legitimate state purposes so as to justify the denial of the development permit."

Lastly, in looking at the factors that have been set forth in *Penn Central*, the U.S. Supreme Court case at 438 US 104, it deserves some initial comment. I do agree with defense counsel in his analysis in the sense of how he looked at it in his moving papers. In Matteoni's treatise which I'll go to in just a second, he points out that at *Penn Central* at page 124 the court in that case indicates that, "There is, quote, no [11] absolute formula, end quote, for determining whether land use or regulation or both is an unconstitutional exercise of the police power."

And as Mr. Williams has pointed out, this analysis is essentially, and I agree with him, quote, an ad hoc inquiry, although I note that plaintiff disagrees with that, at least I believe in the case management statement.

I've reviewed Mr. Matteoni's Treatise on Inverse Condemnation Volume Two *Condemnation Practice in California* Second Edition Chapter 15 which has an exhaustive analysis of all the cases that have been decided on this particular issue under the rubric of causes of action for regulatory taking, and I don't intend to go through an analysis – an exhaustive analysis of each and every factor, but I do believe that what Mr. Matteoni says at 15.1 indicates that this is not a settled area of law by any stretch of the imagination. He points out that, "Since the 1970's, the use of inverse condemnation to challenge governmental regulation of property has been explosive in California and elsewhere. Various types of zoning, conditions of development, development fees, and rent control have been litigated, based on a cause of action claiming uncompensated taking of private property for public use. A regulatory taking is often referred to as an unreasonable exercise of a public entity's police power."

[12] Court goes – or Mr. Matteoni goes on to state, "To escape liability for its interference with private property rights, the public entity's regulatory action must be necessary for the general good of the public," citing *Keystone Bituminous Coal v. DeBenedictis* 480 US 470 and *House v. Los Angeles County Flood Control District* 25 Cal.2d 384.

There also is a – although not raised specifically in the course of this case, there is an inextricably intertwined with the issue of regulatory taking issue due process, and I don't think we need to spend a lot of time discussing it. But as Mr. Matteoni states that, "Cases involving substantive due process are decided based on whether the regulation has a legitimate public purpose to which the restriction bears a rational connection." And a taking claim based on a legal theory that the regulation has a proper public purpose but imposes so severe a burden on individual property as to the taking of private property for public use without prior compensation was allowed in the Lucas *v. South Carolina Coastal Council* case, (1992) Supreme Court case.

Suffice it to say, that I reviewed all the factors, and I do feel that the factors weigh in on the side of plaintiff in that their taking has occurred.

But I'd like to comment more specifically to the testimony in this case in one aspect of it which I think is somewhat important in the Court's analysis, and [13] that's Mr. Henn's testimony. I do believe that his testimony was not entirely credible, and the reason for that is that based on the totality of his testimony, indicating that, first of all, his testimony that out of the number of years he worked for the City and of the 200 lot line adjustments

that he considered, only this one was denied. Actually, he said only one was denied, and this was one that was denied.

It also strikes me that the analysis given by the City that somewhat – if I can describe it the bigger the slope the larger the lot needed analysis that is part of the decision to deny the lot line adjustment flies in the face of Mr. Henn's testimony relating to the development of the tank site in question given the small space involved.

So in short, I didn't find Mr. Henn's testimony to be persuasive or entirely credible.

For all of those reasons, the Court finds that there is a taking in this particular case.

All right. We'll take a short recess, then we'll go on to the damage provision.

MR. BOWIE: Thank you, your Honor.

MS. STONE: Thank you.

---

[14] PARTIAL PROCEEDINGS

THE COURT: Okay. Court finds that the damages incurred by plaintiff are $611,666.66 and exclusive of costs and fees which will be determined separately in a cost memorandum. Court finds there's no contrary expert opinion that has been adduced to Mr. Everett's testimony.

MR. WILLIAMS: Your Honor, excuse me.

THE COURT: Well, is it my turn yet, or do I get a chance? Then I will give you an opportunity to talk.

MR. WILLIAMS: Thank you.

THE COURT: There's no expert testimony that's been adduced contrary to Mr. Everett's testimony during the course of the case, so the Court finds that the fair market value of the property in question is $611,666.66.

Now, Mr. Williams, go ahead.

MR. WILLIAMS: Yes, your Honor. It was my intention – I thought I made it clear – that we were submitting the East Bay Municipal Utility District appraisal as the City's appraisal if the Court found liability on the part of the City.

THE COURT: I've considered the East Bay Municipal Utility District appraisal.

[15] MR. WILLIAMS: Thank you.

THE COURT: Okay. Anything else?

MR. BOWIE: Not right now, your Honor. Thank you.

THE COURT: All right. The parties had indicated an intent to have a Statement of Decision in this particular case. I'll assume under 232 of the California Rules of Court that that's a request for a Statement of Decision. I will direct Mr. Bowie to prepare the statement – tentative Statement of Decision pursuant to 232 California Rules of Court as well as the judgment. And subject to any of the time requirements or objections or contrary statements being submitted, that will be the judgment of the Court.

So you will have 10 days to prepare that – actually, I think 15 days under 232, so 15 days with five days if it's mailed, so please review 232, Mr. Bowie. You'll prepare the Statement of Decision as to liability and damages and judgment.

MR. BOWIE: I'll do that, your Honor.

THE COURT: All right. Any other things that we need to address for the record?

Thank you very much. Have a good day.

MR. BOWIE: Thank you, your Honor.

MS. STONE: Thank you, your Honor.

(Whereupon, the proceedings were concluded.)

---

[16] STATE OF CALIFORNIA)
) ss.
COUNTY OF CONTRA COSTA)

I, DINA HOLLAND, do hereby certify:

That I am a Certified Shorthand Reporter of the State of California; that I was duly appointed shorthand reporter by the above-named Court in the foregoing entitled Court and cause;

That on the 14th day of June, 2000, I fully, truly, and correctly took down in shorthand writing all of the proceedings had and all of the testimony given in said Court and cause at the hearing in said matter;

That I thereafter fully, truly and correctly transcribed the same into typewriting; that the foregoing pages 1

through 15 is a full, true and correct transcript of my shorthand notes taken at said hearing and at the time and place therein named.

IN WITNESS WHEREOF, I have hereunto set my hand this 16th day of June, 2000.

/s/ Dina M. Holland
DINA M. HOLLAND, CSR NO. 9693

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

PETER G. LOEWENSTEIN and HELEN LOEWENSTEIN, Petitioners and Plaintiffs, vs. CITY OF LAFAYETTE, et al., Respondents and Defendants.	Case No. C98-03977 NOTICE OF ENTRY OF JUDGMENT (Filed Oct. 10, 2000)

TO DEFENDANT CITY OF LAFAYETTE AND ITS ATTORNEYS OF RECORD, CHARLES J. WILLIAMS, and E. CLEMENT SHUTE, SHUTE, MIHALY & WEINBERGER, LLP:

NOTICE IS HEREBY GIVEN, that on October 2, 2000, Judgment was entered in the above-entitled action. A copy of said Judgment is attached hereto, marked Exhibit A and made a part hereof by reference.

Dated: October 6, 2000 /s/ David J. Bowie
David J. Bowie, Attorney
For Plaintiffs

EXHIBIT A

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

PETER G. LOEWENSTEIN and HELEN LOEWENSTEIN, Petitioners and Plaintiffs, vs.	Case No. C98-03977 [CORRECTED] JUDGMENT (Filed Oct. 2, 2000)

CITY OF LAFAYETTE, et al.,)
)
Respondents and)
Defendants.)
)

On September 24, 1998, the Petitioners and Plaintiffs Loewenstein filed their Petition for Writ of Mandamus and Complaint for Declaratory Relief and for Damages. On March 9, 1999, the Honorable Richard L. Patsey, Judge presiding, issued an Order Granting Petition for Writ of Mandate following the Motion of Petitioners and Plaintiffs for Issuance of a Peremptory Writ of Mandate and oral argument thereon. The aforesaid Order was not determinative of the damages issues raised by Petitioners and Plaintiffs and said issues were set for Trial.

Following Motions in Limine made by the Respondent and Defendant, City of Lafayette, the Court entered its Decision and Order Re: Ripeness on January 27, 2000. The Judge presiding was the Honorable Richard L. Patsey. The said Order transferred this cause to the Honorable Maria Rivera, Judge, for the purpose of setting a trial date for hearing of the damages Causes of Action of the Complaint related to a "Takings" claim.

On April 24, 2000, the Honorable Maria Rivera, Judge, presiding, entered an Order Re Tentative Ruling in which she set this subject cause for trial on June 12, 2000. The purpose of trial was to take factual evidence regarding the "Takings" issues of Petitioners and Plaintiffs Loewenstein and to determine the amount of "Just Compensation", due, if any. Judge Rivera thereafter recused herself and this subject case was assigned for trial to the Honorable William M. Kolin, Judge, presiding, with Stipulation of Counsel for the parties. Judge Kolin bifurcated the trial

issues and first determined that a "Takings" had occurred. Thereafter, the parties waived a jury as to the second bifurcated issue of "Just Compensation" and the matter was tried to the court, sitting without a jury.

The trial of this subject case commences June 12, 2000 in Department 18 of this Court before the Honorable William M. Kolin, Judge, presiding. The Petitioners and Plaintiffs were represented by and through their attorneys David J. Bowie and Colette Stone. The Respondent and Defendant, City of Lafayette was represented by its attorney, Charles J. Williams. The matter was submitted June 14, 2000.

The Court, having considered all of the evidence submitted by the parties together with argument of counsel, and having prepared and filed its Statement of Decision, IT IS ORDERED, ADJUDGED, AND DECREED that:

1. That a Peremptory Writ of Mandate shall issue commanding Respondent and Defendant, City of Lafayette, to reconsider its decision in light of this Court's decisions;

2. That Petitioners and Plaintiffs shall have and recover from Respondent and Defendant, City of Lafayette, the sum of $475,000 together with interest at the legal rate of 10% per annum in the aggregate sum of $611,666.66 accrued through June 14, 2000, together with such further interest as shall accrue until payment.

3. That Petitioners and Plaintiffs shall have and recover litigation cost and expenses pursuant to Code of Civil Procedure Section 1036.

DATED: SEP 25 2000

WILLIAM M. KOLIN
William M. Kolin, Judge of the
Superior Court

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF CONTRA COSTA

PETER G. LOEWENSTEIN and HELEN LOEWENSTEIN, Petitioners and Plaintiffs, vs. CITY OF LAFAYETTE, a Municipal Corporation, and DOES 1 through 50, inclusive, Respondents and Defendants.	) Case No. C98-03977) AMENDED RETURN TO PEREMPTORY WRIT OF MANDATE) Date: November 30, 2000) Dept.: 18) Time: 9:00 a.m.) (Filed November 16, 2000)

To THE SUPERIOR COURT OF THE STATE OF CALIFORNIA:

Respondent, CITY OF LAFAYETTE, makes the following Amended Return to the Peremptory Writ of Mandate issued in this action:

At its November 13, 2000 meeting, the City Council of the City of Lafayette ("Council") directed its counsel to file this Amended Return to the Peremptory Writ of Mandate issued in this action. This Amended Return supersedes in all respects the City's original Return to the Peremptory Writ of Mandate, filed January 19, 2000.

In its original Return to the Writ, the City reported that the City Attorney had been directed by the Council to file a Notice of Appeal on the writ claim. Subsequently, the Council decided to reconsider that directive in view of the Court's judgment in favor of Petitioners on their inverse condemnation claim. At its November 13 meeting, the Council elected to exercise its prerogative to withdraw the restriction causing the alleged taking and thereby limit its potential takings liability to interim damage for the period of time the restriction was effective. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

Accordingly, the Council, on behalf of the City, has directed its counsel to inform the Court that the City withdraws its legal position that it had the authority to deny the lot line adjustment requested by Petitioners under the facts of this case. Further, the City will vacate its decision of August 10, 1998, denying Petitioners' application for a three parcel lot line adjustment and will, if requested by Petitioners, reconsider its action denying the lot line adjustment, and grant such application so long as it is the same or substantially similar to Petitioners' existing application and conforms to existing local zoning and building ordinances.

CHARLES J. WILLIAMS, APC
City Attorney

Dated:
November 15, 2000

SHUTE, MIHALY &
WEINBERGER LLP

By: /s/ E. Clement Shute, Jr.
E. CLEMENT SHUTE, JR.

Attorneys for Respondent
and Defendant CITY OF
LAFAYETTE

BEFORE THE CITY COUNCIL
OF THE CITY OF LAFAYETTE

In the Matter of:

Rescinding Resolution No. 69-98 relating to the denial of the appeal of Peter and Helen Loewenstein that affirmed the decision of the planning commission to deny a request for a three parcel lot line revision, Burton Vista Court, R-20 Zone, APN 236-090-012, 236-090-015, 239-100-002.	Resolution No. 78-00 SUBMITTED 2000 NOV 30 Judge Kolin Dept. 18 Superior Court Contra Costa County

RECITALS

A. On August 10, 1998, the City Council adopted Resolution No. 69-98 denying the authority to use the lot line adjustment process proposed by Peter and Helen Loewenstein (the Loewensteins");

B. Thereafter the Loewensteins filed an action in Superior Court of Contra Costa County (Case No. C98-03977) challenging the denial and seeking a writ of mandate commanding the City Council to set aside its decision and to grant the lot line adjustment;

C. On March 9, 1999, The Honorable Richard L. Patsey, Judge of the Superior Court entered his order granting the petition for writ of mandate and on November 3, 1999 issued a peremptory writ of mandate directing the City to set aside its decision of August 10, 1998 and to take such further actions specifically enjoined on the City;

D. On January 9, 2000, the City, as directed by the Council, filed its return to the peremptory writ of mandate advising the court that the City intended to appeal the judgment granting the peremptory writ of mandate upon entry of a final judgment.

E. In addition to the petition for writ of mandate, the Loewensteins alleged a claim in inverse condemnation alleging that the City's denial of the lot line adjustment constituted a permanent taking of their property without the payment of just compensation. A trial was held on the inverse condemnation cause of action and on October 2, 2000 a final judgment was entered by the Honorable William M. Kolin directing that a peremptory writ of mandate issue commanding the City to reconsider its decision on the lot line adjustment and entering judgment on the inverse condemnation cause of action in the amount of $475,000.00 together with interest at 10% a year totaling $611,666.66, together with an award of litigation costs and expenses to be determined;

F. On October 19, 2000, the City filed is notice of intention to move for a new trial and a hearing on this motion has been set for November 30, 2000;

G. Under principles of takings jurisprudence, the City retains the power to amend, rescind or withdraw its action resulting in an alleged takings in order to limits its liability. Accordingly, at its meeting of November 13, 2000, the City Council directed the City attorney to file an amended return to the peremptory writ of mandate informing the court that the City withdraws its legal position that it had the authority to deny the lot line adjustment under the particular facts and that the City will vacate its decision of August 10, 1998 denying the three parcel lot line adjustment if requested by Petitioners, and will reconsider its decision and grant a lot line adjustment

so long as the request is the same or substantially the same as the application and will conform to existing zoning and building ordinances;

Now, therefore, the City Council, the City of Lafayette finds, determines and orders as follows:

1. Resolution No. 69-98 adopted on August 10, 1998 is rescinded;

2. If requested by the Loewensteins, the City Council will reconsider its decision set forth in Resolution No. 69-98 that denied the lot line adjustment and will grant the lot line adjustment so long as the request is the same or substantially similar to Petitioner's application and conforms to existing zoning and building ordinances.

This Resolution was passed and adopted at a meeting of the City Council of the City of Lafayette at a meeting held on November 27, 2000 the following vote:

AYES: Mayor Samson, Councilmembers Tatzin, Strauss, Horn, Federighi

NOES: None

ABSENT: None

ABSTAIN: None

Ivor Samson /s/
Mayor

ATTEST:

/s/ _____
City Clerk

CERTIFIED AS A TRUE COPY
CLERK OF CITY OF
LAFAYETTE, CALIFORNIA

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

PETER G. LOEWENSTEIN and HELEN LOEWENSTEIN, Petitioners and Plaintiffs, vs. CITY OF LAFAYETTE, et al., Respondents and Defendants.	Case No. C98-03977 ORDER IN RE MOTION FOR NEW TRIAL (Filed Dec. 12, 2000)

On November 30, 2000, the Motion for New Trial filed by the Defendant City of Lafayette was heard in Department 18 before the Honorable William M. Kolin, Judge presiding. The Plaintiffs appeared by and through their attorney, David J. Bowie; the Defendant appeared by and through its attorneys, Charles J. Williams and E. Clement

Shute, Jr. The Court, having previously issued its written Tentative Ruling and having declined to grant Defendants' Motion on the grounds stated; the Defendant City of Lafayette having provided notice of its withdrawal of its rejection of Plaintiffs' lot line adjustment application, and the parties having agreed.

IT IS HEREBY ORDERED, that Defendant's Motion for New Trial shall be and hereby is denied; provided, however, pursuant to Code of Civil Procedure Section 662, this Court shall reopen this case for the limited purpose of determining whether or not the Defendant City's notice of withdrawal of its rejection of Plaintiffs' lot line adjustment application shall be deemed to have converted the permanent "Taking" found by the Court into a temporary "Taking", which might in turn affect the amount of damages awarded in the Judgment.

IT IS FURTHER ORDERED that, pursuant to CCP Section 662, the parties shall engage in settlement discussions under the supervision of the Court and all parties and counsel shall appear in Department 18 on December 14, 2000 at 9:30 a.m., for a Settlement Conference.

Dated 12/5/00

WILLIAM M. KOLIN
William M. Kolin, Judge
of the Superior Court

APPROVED AS TO FORM

/s/ Charles J. Williams
Attorney for Defendant

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF CONTRA COSTA

PETER G. LOEWENSTEIN and HELEN LOEWENSTEIN, Plaintiffs, vs. CITY OF LAFAYETTE, a Municipal Corporation, and DOES 1 through 50, inclusive, Defendants.	) Case No. C98-03977) NOTICE OF APPEAL) [Code Civ. Proc. § 904.1]) (Filed Dec. 27, 2000)

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN that Defendant, CITY OF LAFAYETTE, appeals to the Court of Appeal of the State of California, First Appellate District, from the

Judgment entered on October 2, 2000, in Department 18 of the above-entitled court.

Notice of Entry of Judgment was served by Plaintiffs on October 6, 2000. Motion for new trial was denied by operation of law on December 5, 2000.

CHARLES J. WILLIAMS, APC
City Attorney

Dated:
December 26, 2000

SHUTE, MIHALY &
WEINBERGER LLP

By: /s/ E. Clement Shute, Jr.
E. CLEMENT SHUTE, JR.

Attorneys for Defendant
CITY OF LAFAYETTE

(2)

No. 02-1662

FILED
JUL 14 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PETER G. LOEWENSTEIN and HELEN LOEWENSTEIN,

Petitioners,

v.

CITY OF LAFAYETTE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

BRIEF IN OPPOSITION

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29 pp

QUESTIONS PRESENTED

1. Whether the California Court of Appeal properly applied the "normal delay" doctrine to reject Petitioners' temporary takings claim for the period during which they pursued litigation challenging the legality of the City's denial of their lot line adjustment application, where the Court of Appeal concluded that the City's actions were objectively reasonable under state law.

2. Whether this Court should re-weigh the Court of Appeal's determination that the City's denial of Petitioners' lot line adjustment application substantially advanced a legitimate governmental interest, where that determination by the state court was based on its interpretation of state law and evidence in the record.

3. Whether *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), requires payment of takings compensation for the denial of a lot line adjustment application, where the trial court concluded the denial was invalid and the City elected to grant the lot line adjustment rather than litigate the issue further.

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Respondent, the City of Lafayette ("City"), respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the decision of the California Court of Appeal in this case.

STATEMENT OF THE CASE

California's state law regulating the subdivision of land (the Subdivision Map Act) excepts from its requirements certain applications for the adjustment of lot lines between existing adjacent parcels. Petitioners, who purchased a very small and inexpensive parcel of land, argued that under the terms of this lot line adjustment exception, the City had no choice but to allow them to dramatically increase the size of the small lot using large amounts of land taken from certain adjacent parcels that could not themselves legally be subdivided. Petitioners' plans to expand and then develop the small parcel were temporarily delayed while Petitioners pursued state court litigation regarding the legality and reasonableness of the City's position that the lot line adjustment exception did not apply to the unique circumstances of this case.

Petitioners were ultimately allowed, by the City, to adjust the lot lines as proposed, but sought temporary takings damages for development delay. The California Court of Appeal dismissed Petitioners' takings claim because, although the trial court found the City's interpretation of the Subdivision Map Act to be erroneous, the City's actions were objectively reasonable given the unique facts of this case. Under the well-established normal delay doctrine in takings law, a plaintiff who suffers development delay as the result of such an objectively reasonable governmental action is not entitled to takings compensation.

The Petition for a Writ of Certiorari presents a fact-intensive and meritless challenge to the state court's conclusion that the City's actions were reasonable and legitimate. The Petition also posits a series of nonexistent inter-jurisdictional conflicts of authority and conflicts with decisions of this Court in an effort to convince this Court to grant review. Such review is not appropriate because Petitioners' objections to the Court of Appeal's decision relate principally to issues of fact and interpretation of state law. Moreover, none of the conflicts alleged by Petitioners actually exist.

BACKGROUND

A. CALIFORNIA SUBDIVISION MAP ACT.

California regulates the subdivision of land through a statute known as the Subdivision Map Act. Cal. Gov't Code §§ 66410-66499.37 (West 2003). At all times relevant for this litigation, the Subdivision Map Act contained an exception covering proposed lot line adjustments between "existing adjacent parcels, where the land taken from one parcel is added to an adjacent parcel, and where a greater number of parcels than originally existed is not thereby created. . . ." Cal. Gov't Code § 66412(d) (West 2001). Whereas the Subdivision Map Act "provides opportunities for neighborhood input on the effects of development and detailed study of all impacts on the community," the lot line adjustment procedure is summary in nature. Petition for a Writ of Certiorari ("Pet.") Appendix ("App.") at 20. Accordingly, in considering a lot line adjustment application, a local agency would be required to "limit its review and approval to a determination of whether or not the parcels

resulting from the lot line adjustment will conform to local zoning and building ordinances." Cal. Gov't Code § 66412(d).

B. PETITIONERS' PLAN TO AVOID THE REQUIREMENTS OF THE SUBDIVISION MAP ACT.

Petitioners have, since approximately 1984, resided in a 4,400 square-foot home on a three-acre hillside lot in the City ("homesite parcel"). In 1996, Petitioners purchased for $13,500 a very small (approximately 0.1 acre) parcel adjoining their homesite parcel ("tank parcel"). *See* Appendix A, Fig. 1.[1] Petitioners' idea was to seek to enlarge that tank parcel significantly through the addition of approximately two acres taken from their homesite parcel and a small portion of a neighbor's parcel. *See* Appendix A, Fig. 2. Petitioners proposed to complete this reconfiguration utilizing the above-described summary lot line adjustment exception to the Subdivision Map Act.

The trouble with Petitioners' plan lay in the fact that the land they proposed to carve out for addition to the tank parcel was part of a 4-unit subdivision created in 1977, subject to the express condition that it not be further subdivided. Pet. App. at 2. The tank parcel lay outside of that subdivision.

One of the more striking and valued characteristics of the City is its hillsides, and, as the Court of Appeal observed,

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1. The drawings attached hereto as Appendix A were prepared based on information in the record, and are included herewith pursuant to Supreme Court Rules 14(1)(i) and 15. The City originally submitted the drawings to the Court of Appeal for ease of understanding the facts. Petitioners raised no objections to the drawings.

"[h]illside properties require particular oversight." *Id.* at 20. The City has, therefore, carefully designed and administered local land use regulations to limit hillside development, protect hillside resource values and guard against the adverse impacts of inappropriate hillside development.

Petitioners' lot line adjustment application was cause for concern because the City recognized that the proposal to split off land from within the 1977 subdivision to enlarge the tank parcel would effectively allow a fifth building site within the 1977 subdivision, which was expressly limited to four houses. This would violate the conditions imposed on the 1977 subdivision. On the advice of its City Attorney, therefore, the City denied Petitioners' lot line adjustment application. *Id.* at 25 (City "believed the adjustment would create an extra lot in a restricted subdivision and . . . violate municipal ordinances regarding hillside property").

Petitioners challenged the City's determination that the Subdivision Map Act's lot line adjustment exception did not apply. The trial court noted that it was faced with a "very close and . . . difficult case," but ultimately concluded that the City erred as a matter of state law in denying Petitioners' application. Pet. App. at 8, 28. The City decided not to appeal that issue, and instead granted Petitioners' lot line adjustment application. *Id.* at 12.

C. PETITIONERS' TAKINGS CLAIM.

Because the City granted Petitioners' lot line adjustment, the narrow issue decided by the Court of Appeal was whether Petitioners were entitled to recover temporary takings damages for the period during which the City's denial of their lot line adjustment application was in effect. The Court of

Appeal's decision reversed the $611,666.66 trial court takings award because it concluded that under clearly applicable California Supreme Court precedent, *Landgate, Inc. v. California Coastal Comm'n*, 953 P.2d 1188 (Cal. 1998), *cert. denied* 525 U.S. 876 (1998), the City's denial of the lot line adjustment application, even if erroneous, did not give rise to temporary takings damages.[2]

Landgate holds that a legally erroneous but objectively reasonable governmental action taken to advance a legitimate governmental interest will not occasion a compensable constitutional taking, even if it has the effect of delaying a land owner's development plans.[3] *Landgate*, 953 P.2d

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2. As Petitioners note, the trial court awarded permanent takings damages. Pet. at 13-14. The City subsequently exercised its discretion to approve the lot line adjustment, converting any taking, if one occurred, to a temporary rather than a permanent taking. Because the Court of Appeal found no taking had occurred, the record does not indicate what the value of a temporary taking would be.

3. *Landgate* involved the developer of a large home in the Malibu Hills who sought takings damages from the California Coastal Commission, which erroneously asserted jurisdiction over a lot line adjustment necessary for development. *Landgate*, 953 P.2d at 1190, 1193. The California Supreme Court found that

> Landgate [had] not demonstrated that the development delay . . . was due to anything other than a bona fide dispute over the legality of Landgate's lot and the Commission's jurisdictional authority over the lot line adjustment. Such delay is an incident of property ownership and not a taking of property. Although Landgate was in the unfortunate position of suffering from a delay not of its own making, the same can be

(Cont'd)

at 1197. This Court denied the petition for a writ of certiorari filed in *Landgate*, 525 U.S. 876 (1998). The City of Lafayette was not liable for a temporary taking under the *Landgate* doctrine because its application of the Subdivision Map Act to the particular facts of this case was not "so objectively unreasonable as to give rise to the inference that [the City] was adopting that position solely for purposes of delay or some other illegitimate reason." *Landgate*, 953 P.2d at 1200; Pet. App. at 22-27.

REASONS FOR DENYING THE PETITION

Petitioners have presented a lengthy and convoluted Petition for a Writ of Certiorari based on a number of meritless and potentially misleading arguments. The City's best efforts to decipher the Petition indicate that Petitioners are seeking to convince this Court that certiorari is appropriate based on their arguments that the Court of Appeal's decision in this case: (1) was based on inaccurate factual determinations and an improper interpretation of state law; (2) conflicts with a Wisconsin Supreme Court case; and (3) conflicts with various takings decisions of this Court. For the reasons addressed below, none of Petitioners' arguments provides anything approaching sufficient grounds for review by this Court, and the Petition for a Writ of Certiorari should be denied.

(Cont'd)

> said of any governmental mistake or, for that matter, any of a number of possible bottlenecks in the development process.

Id. at 1204 (citations omitted). On that basis, this Court concluded that the California Coastal Commission was not liable for any takings damages. *Id.*

A. PETITIONERS ARE SEEKING REVIEW OF FACTUAL DETERMINATIONS AND INTERPRETATIONS OF STATE LAW.

The central issue before the Court of Appeal was the evaluation of the objective reasonableness of the City's interpretation and application of the lot line adjustment exception to the Subdivision Map Act to the unique facts of this case. Petitioners alleged that the City's denial of the lot line adjustment application was so objectively unreasonable and unsupportable as to lead to the conclusion that it was taken for improper reasons (e.g., to delay development). Pet. App. at 24. The City argued that even if its interpretation of the state law were erroneous, it was nonetheless reasonable in light of the circumstances. *Id.* at 24-25.

After carefully considering the language and goals of the state statute and case law interpreting it, the Court of Appeal concluded that the City's action, even if erroneous, was not so unreasonable as to give rise to takings liability. *Id.* at 25-26. The Court of Appeal concluded that in denying Petitioners' application, the City "attempted to do no more than what the [lot line exception to the Subdivision Map Act] allows – ensure conformance with local zoning and building restrictions." *Id.* at 25. The Petition for a Writ of Certiorari would have this Court review that interpretation and application of state law. *See* Pet. at 20-21. Such review is not an appropriate basis for certiorari. 28 U.S.C. § 1257 (2000); Sup. Ct. R. 10.

Just as importantly, Petitioners devote approximately ten (10) pages of their Petition to an extended recitation of their version of the facts of this case. *See* Pet. at 7-16. This insistence on offering a statement of the facts that differs

from the description in the Court of Appeal's decision is entirely inappropriate at this late stage of litigation and illustrates that Petitioners' objection to the Court of Appeal decision is largely a factual dispute. Supreme Court review of that factual dispute is not warranted.

Petitioners also mischaracterize and shade the facts of this case throughout their Petition. Because these misstatements of facts bear on the issues that would be before this Court if certiorari were granted, the City is obligated to address them here. Sup. Ct. R. 15(2).

Petitioners repeatedly assert that the City's denial of their lot line adjustment application "was found to have been without any support or justification and to have failed to substantially advance any legitimate government interest." Pet. at 1; *see also id.* at 10, 12. This assertion is inaccurate and misleading because it is based on a trial court conclusion that was reversed on appeal. As the Court of Appeal explained, there was no substantial evidence in support of the trial court's finding that the City was not pursuing a legitimate governmental interest. Pet. App. at 19. To the contrary, even assuming the City's denial of the lot line adjustment application was erroneous, it was rational, not legally unreasonable or logically deficient. *Id.* at 15, 25-26. Its actions were taken in good faith, comported with the purposes of the Subdivision Map Act and advanced the City's legitimate interests, including its interest in protecting hillsides and enforcing the conditions in its prior land use approval (the 1977 subdivision). *Id.* at 24-26; *see also id.* at 9.

Petitioners repeatedly assert that the City denied their "development application" for the tank parcel.

See, e.g., Pet. at 3, 9, 11. This assertion is inaccurate and inconsistent with Petitioners' own prior acknowledgment that their lot line adjustment application did not constitute a development application for the tank parcel. It is well established that a takings claim will not be considered ripe for adjudication until the plaintiff has obtained "a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986); *see Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). Petitioners are apparently attempting to blur the critical distinction between their lot line adjustment application, which would only change lines on a recorded map, and the "development application" prerequisite to ripeness, in the hope that they may avoid a conclusion by this Court that their takings claim is not ripe.[4] The ripeness issue would be before this Court if it were to grant certiorari and is an alternate basis for dismissing Petitioners' takings claim.

Petitioners also assert that the lot line adjustment they sought was the only means of supplying access and utilities to the tank parcel. Pet. at 9, 10, 29. This is not accurate. Petitioners could have pursued other options for developing the parcel, but elected not to.[5] Pet. App. at 21 (Court of Appeal

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4. The Court of Appeal expressly declined to reach the ripeness issue because it disposed of the case on other grounds. Pet. App. at 28 n.14.

5. For example, Petitioners could have applied for a two-way lot line adjustment between their homesite parcel and the neighboring parcel in the 1977 subdivision. *See* Appendix A, Fig. 3. Such a two-

(Cont'd)

decision noted Petitioners "were not prevented from building a residence on the tank parcel if they could supply access and were not prevented from supplying an access."); *see also* Appendix A, Figs. 3 and 4.

Petitioners erroneously imply that they purchased the tank parcel based in part on the City's representation that they, as adjoining land owners, should buy that land and use the lot line adjustment process to enlarge it. Pet. at 8, 10. Specifically, Petitioners point to a report from City staff that recommended the City decline to purchase the tank parcel from the East Bay Municipal Utility District. *Id.* at 8. This short staff memorandum is general in nature and naturally includes no analysis of any of the complex legal issues raised by the unusual lot line adjustment Petitioners ultimately requested. The City did not, as Petitioners imply, represent that it would approve any lot line adjustment sought by Petitioners.

Finally, Petitioners incorrectly imply that the City's denial of their lot line adjustment application was a departure from its approval of numerous other lot line adjustment applications over the years. Pet. at 9. As the Court of Appeal explained in its decision, Petitioners have not identified even a single example of a City-approved lot line adjustment that contravened the conditions imposed on an existing subdivision, as the lot line adjustment requested by Petitioners did. Pet. App. at 19. As such, it is disingenuous for Petitioners to represent that the City's denial of their lot line adjustment application was inconsistent with prior practice.

(Cont'd)

way adjustment would have ensured the necessary access to the tank parcel without drawing another lot within the original boundaries of the 1977 subdivision.

As the foregoing makes clear, the Petition for a Writ of Certiorari is based in large part on inaccurate factual representations, and Petitioners are essentially asking this Court to revisit and reopen the factual inquiry already completed in the state courts.

B. THERE IS NO FEDERAL QUESTION CONFLICT BETWEEN THE CALIFORNIA APPEAL COURT'S DECISION IN THIS CASE AND THE WISCONSIN SUPREME COURT'S *EBERLE* DECISION.

Petitioners attempt to justify certiorari based on a nonexistent "federal question" conflict between the Court of Appeal's decision in this case and an opinion of the Wisconsin Supreme Court, *Eberle v. Dane County Board of Adjustment*, 595 N.W.2d 730 (Wis. 1999). Pet. at 2, 16, 21-22 (citing Sup. Ct. R. 10(b)). There is, however, no such conflict, because the Wisconsin Supreme Court did not actually decide any federal question in *Eberle*.

The plaintiffs in *Eberle* advanced both federal and state claims for compensation based on an alleged temporary regulatory taking. *Eberle*, 595 N.W.2d at 734. In addressing the plaintiffs' state law claim, the Wisconsin Supreme Court concluded that the plaintiffs had "stated a valid claim for a temporary regulatory taking under Article I, [section] 13 of the Wisconsin Constitution." *Id.* at 741. Unlike other jurisdictions that have confronted the issue, the Wisconsin Supreme Court declined to incorporate into Wisconsin state law the rule followed by numerous other jurisdictions, including California. *Id.* at 742 n.25 (declining to follow *Landgate*); *see infra* at 14-15 (citations to other jurisdictions'

cases).[6] Because the plaintiffs in *Eberle* were able to obtain compensation under the Wisconsin State Constitution pursuant to their state takings claims, the court properly concluded that their federal claims under 42 U.S.C. § 1983 were not ripe for review, and upheld the lower court's dismissal of those claims. *Id.* at 745 (citing *Williamson County*, 473 U.S. at 195). As a result, the Wisconsin Supreme Court's *Eberle* case did not address, much less decide, the plaintiffs' federal temporary takings claim. Because *Eberle* did not decide that federal question, there is no basis for Petitioners' assertion that the *Eberle* decision conflicts with the decision in this case.[7]

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6. The *Eberle* decision reflects some misunderstanding on the part of the Wisconsin Supreme Court regarding the rule articulated in *Landgate*. The *Eberle* decision describes *Landgate* as adopting a per se rule "that when an agency's erroneous action is reversed by a court, there is no taking. . . ." *Eberle*, 595 N.W.2d at 742 n.25. In fact, the *Landgate* rule specifically provides that an agency action reversed by a court can constitute a taking if that action is not only erroneous but objectively unreasonable. 953 P.2d at 1199-1200.

7. Petitioners also argue that this case conflicts with the *Eberle* holding that the regulatory action at issue denied the property owner "all or substantially all practical uses" of its property because it had the effect of blocking physical access to that property. Pet. at 28-29; *Eberle*, 595 N.W.2d at 740. In addition to being fact-based, that holding, like the other holdings of *Eberle*, does not implicate a federal question and therefore could not give rise to a conflict appropriate for Supreme Court review. Moreover, the City's denial of the lot line adjustment application here did not block access to the tank parcel. Petitioners had available, but chose not to pursue, other options for obtaining such access. *See supra* at 9-10, Appendix A, Figs. 3 and 4. Those options render Petitioners' takings claim not ripe for adjudication. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 619-21 (2001); *MacDonald, Sommer & Frates*, 477 U.S. at 348; *Williamson*

(Cont'd)

C. THE CALIFORNIA APPEAL COURT'S DECISION COMPORTS WITH THIS COURT'S WELL-ESTABLISHED TAKINGS JURISPRUDENCE.

Petitioners argue that this Court should grant certiorari in this case because it offers the opportunity to "elaborate on," "clarify" and "unambiguously define" its prior takings decisions with regard to the concepts of what constitutes "normal" delay, "a legitimate state interest" and "deprivation of all economically feasible use of property." Pet. at 2, 21, 23. In fact, each of these concepts is already clearly articulated and understandable as it relates to this case. As such, Petitioners' argument that this case offers the Court the opportunity to "clarify" its takings jurisprudence is nothing more than an invitation to issue an improper and unnecessary advisory opinion. Petitioners also advance meritless arguments that the Court of Appeal's decision conflicts with the following decisions of this Court: *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

(Cont'd)

County, 473 U.S. at 186 (takings claims not ripe where plaintiff has not obtained final determination regarding the type and intensity of permissible development).

1. THERE IS NO CONFLICT BETWEEN THE CALIFORNIA APPEAL COURT'S DECISION AND THIS COURT'S *FIRST ENGLISH* DECISION.

In *First English*, this Court held for the first time that governments are obligated to compensate land owners who suffer a temporary regulatory taking of their property. 482 U.S. at 321 ("where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective"). The Court specifically noted, however, that its holding did not extend to the quite different question of whether land owners are entitled to temporary takings damages for "normal delays" in the development process. *Id.*; *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 328-29 (2002). Such delays are an incident of property ownership and are not a taking. *Agins*, 447 U.S. at 263 n.9 (citation omitted).

In the decade and a half since *First English* was decided, innumerable jurisdictions have interpreted and applied the "normal delay" exception to the temporary takings compensation requirement. Those jurisdictions have overwhelmingly followed *First English* by recognizing that reasonable but erroneous governmental actions (i.e., good faith mistakes) that cause development delay do not give rise to temporary takings liability. *See, e.g.*, *Cannone v. Noey*, 867 P.2d 797, 801 n.8 (Alaska 1994); *Jacobi v. City of Miami Beach*, 678 So. 2d 1365, 1367 (Fla. Dist. Ct. App. 1996); *Steinbergh v. City of Cambridge*, 604 N.E.2d 1269, 1275-77 (Mass. 1992), *cert. denied*, 508 U.S. 909 (1993); *Torromeo v. Town of Fremont*, 813 A.2d 389, 392 (N.H. 2002),

cert. denied, 123 S. Ct. 2283 (2003); *Dumont v. Town of Wolfeboro*, 622 A.2d 1238, 1244 (N.H. 1993); *Smith v. Town of Wolfeboro*, 615 A.2d 1252, 1257-58 (N.H. 1992); *Griffith v. State of New Jersey*, 775 A.2d 54, 60-62 (N.J. 2001), *cert. denied*, 534 U.S. 1161 (2002); *Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334, 343-44 (N.J. 2001), *cert. denied*, 535 U.S. 1077 (2002); *Lujan Home Builders, Inc. v. Town of Orangetown*, 568 N.Y.S.2d 850, 851 (Sup. Ct. 1991); *Miller & Son Paving, Inc. v. Flumstead Township*, 717 A.2d 483, 487 (Pa. 1998), *cert. denied*, 525 U.S. 1121 (1999); *Sea Cabins on the Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach*, 548 S.E.2d 595, 604-05 (S.C. 2001); *Chioffi v. City of Winooski*, 676 A.2d 786, 788-89 (Vt. 1996); *Tabb Lakes, Inc. v. United* States, 26 Cl. Ct. 1334, 1354 (1992); *1902 Atlantic, Ltd. v. United States*, 26 Cl. Ct. 575, 581-82 (1992).

The California Supreme Court adopted this widely held interpretation of the "normal delay" exception in *Landgate*, 953 P.2d at 1203. California's courts have subsequently applied the rule to various factual situations, including in this case. *See, e.g., Encinitas Country Day School v. California Coastal Comm'n*, 133 Cal. Rptr. 2d 551 (2003); *Loewenstein v. City of Lafayette*, 127 Cal. Rptr. 2d 79 (2002); *Ali v. City of Los Angeles*, 91 Cal. Rptr. 2d 458 (Ct. App. 1999), *cert. denied*, 531 U.S. 827 (2000); *Calprop Corp. v. City of San Diego*, 91 Cal. Rptr. 2d 792 (Ct. App. 2000); *Buckley v. California Coastal Comm'n*, 80 Cal. Rptr. 2d 562, 576-77 (Ct. App. 1998), *cert. denied*, 528 U.S. 816 (1999); *see also North Pacifica, LLC v. City of Pacifica*, 234 F. Supp. 2d 1053, 1064-65 (N.D. Cal. 2002). Petitioners incorrectly characterize *Landgate* as having totally eliminated the availability of temporary takings damages in California. Pet. at 1, 18-20. That is not the case. Such damages are

available and have been awarded to plaintiffs whose projects are delayed due to objectively unreasonable and erroneous governmental action. *See Ali*, 91 Cal. Rptr. 2d at 464-65 (temporary takings damages appropriate under *Landgate* because City's denial of demolition permit was "arbitrary and unreasonable" under state law).

As even Petitioners acknowledge, the Court of Appeal's decision is a straightforward application (i.e., not an expansion) of the "normal delay" rule in *Landgate* to the particular facts of this case. Pet. at 1. Petitioners simply disagree with the widely adopted "normal delay" rule and ask this Court to grant certiorari in order to reverse it. *Id.* at 16-21. Such a reversal would be inappropriate because the "normal delay" rule is acknowledged in *First English* as an exception to temporary takings liability. Moreover, such a reversal would have a significant chilling effect on the valid and appropriate exercise of local land use powers. Recognizing this, this Court has properly declined to review *Landgate* and numerous similar decisions from California and other jurisdictions. 525 U.S. 876 (1998); *see also* certiorari-denied cases in two preceding paragraphs.

2. THERE IS NO CONFLICT BETWEEN THE CALIFORNIA APPEAL COURT'S DECISION AND THIS COURT'S *AGINS* AND *NOLLAN* DECISIONS.

In describing the City's denial of Petitioners' lot line adjustment application, the Court of Appeal concluded that under state law, the denial was reasonable (even if it was erroneous) because it furthered the City's legitimate regulation of hillside development, furthered public input and was calculated to "ensure conformance with local

zoning and building restrictions." Pet. App. at 19-20, 25-26. These conclusions are supported by substantial evidence in the record and are consistent with this Court's recent recognition of the importance of local land use planning and the fact that such activities result in non-compensable development delay. *See Tahoe-Sierra*, 535 U.S. 302.

Petitioners' argument that this case conflicts with *Agins* and *Nollan* is actually a thinly veiled attempt to have this Court second-guess the California state court's conclusion regarding the legitimacy of the City's actions under state law.[8] Pet. at 22-27. Notwithstanding the Court of Appeals' clear contrary conclusion, Petitioners argue that the City's denial of the lot line adjustment application did not substantially advance legitimate governmental goals such as hillside protection and the enforcement of conditions placed on land use approvals like the 1977 Subdivision. *Id.*; Pet. App. at 25-26. Petitioners also argue that the City would have advanced more legitimate governmental interests by approving the proposed lot line adjustment. Pet. at 10, 25-26 (positing governmental interest in enlarging small parcels like the tank parcel to accommodate development of very large homes like those in the surrounding neighborhood). Petitioners would like this Court to conduct its own factual inquiry and second-guess a

8. It should be noted that this Court has raised substantial doubt as to whether the "substantially advance" test articulated in *Nollan* and *Agins* has any role in takings law, outside the context of exactions. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 540-47, 554-58 (1998) (majority of Justices rejected the plurality's takings analysis and held that the due process clause – not the takings clause – is the proper context for analyzing the validity of governmental action based on a means-end inquiry); *see also City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 704 (1999).

published state court decision regarding the proper interpretation of the state Subdivision Map Act and the legitimacy of the City's application of that statute. These are not appropriate grounds for granting Petitioners' Petition for a Writ of Certiorari. *See Tahoe-Sierra*, 535 U.S. at 333-34 (declining to reconsider findings that government "acted diligently and in good faith" and took actions that "represented a proportional response to a serious risk of harm").

3. THERE IS NO CONFLICT BETWEEN THE CALIFORNIA APPEAL COURT'S DECISION AND THIS COURT'S *LUCAS* DECISION.

Again asserting a nonexistent conflict, Petitioners urge this Court to grant certiorari in order to "add precision" to its "deprivation of all economically feasible use" rule articulated in *Lucas*, 505 U.S. 1003. Pet. at 27-29. That test is wholly irrelevant in this case, however, because there has not been and could be no finding that Petitioners were deprived of all economically feasible use of the tank parcel. Pet. App. at 26-27. As noted, *supra* at 9-10, the City's denial of the lot line adjustment did not prevent Petitioners from using and developing the tank parcel and did not prevent them from supplying access and utilities to that parcel through means other than the specific lot line adjustment requested. As such, there is absolutely no merit to Petitioners' assertion that they were denied all economically feasible use of their property, and no merit to their claim that this case is therefore governed by *Lucas*.[9]

9. Petitioners' request that the Court use this case to clarify its "deprivation of all economically feasible use" doctrine also ignores the fact that this Court's recent opinion in *Tahoe-Sierra*, 535 U.S. at 328-35, does just that.

CONCLUSION

In view of the foregoing, the City respectfully requests that the Court deny Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

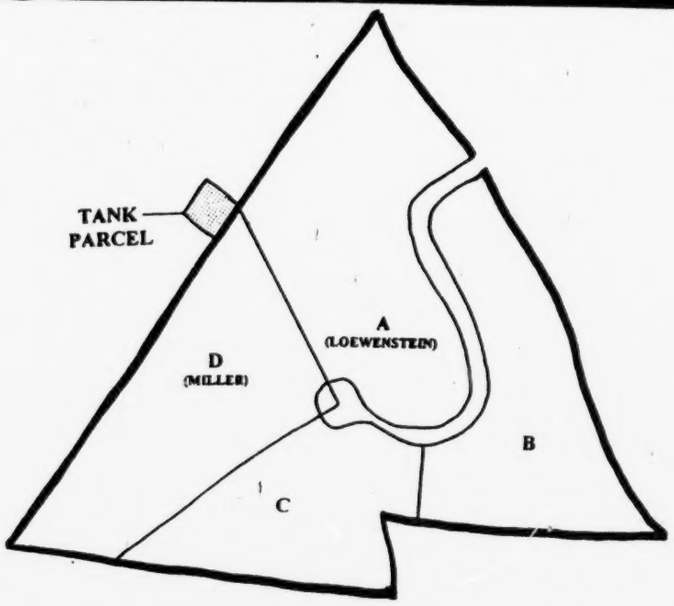

FIG 1: 1977 SUBDIVISION (MSL 7-77) AND TANK LOT PRIOR TO 2001 LOT LINE ADJUSTMENT

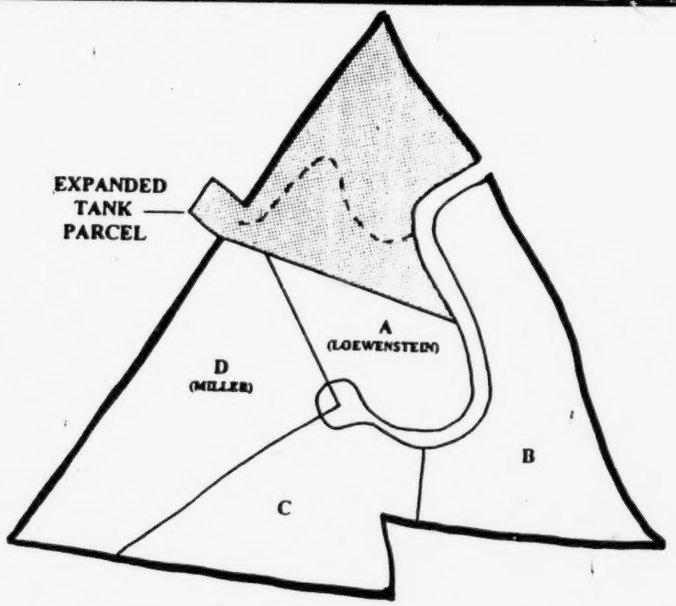

FIG 2: LOT LINE ADJUSTMENT PROPOSED BY RESPONDENTS (as granted by City in 2001)

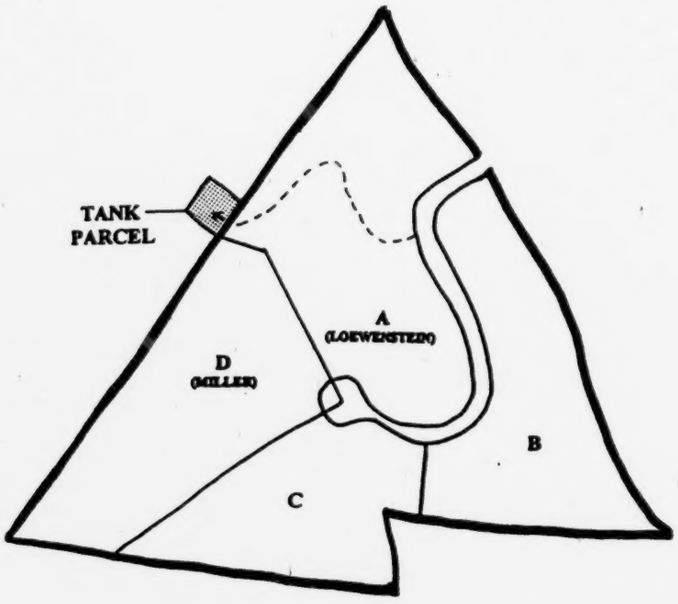

FIG 3: 2-WAY LOT LINE ADJUSTMENT OPTION

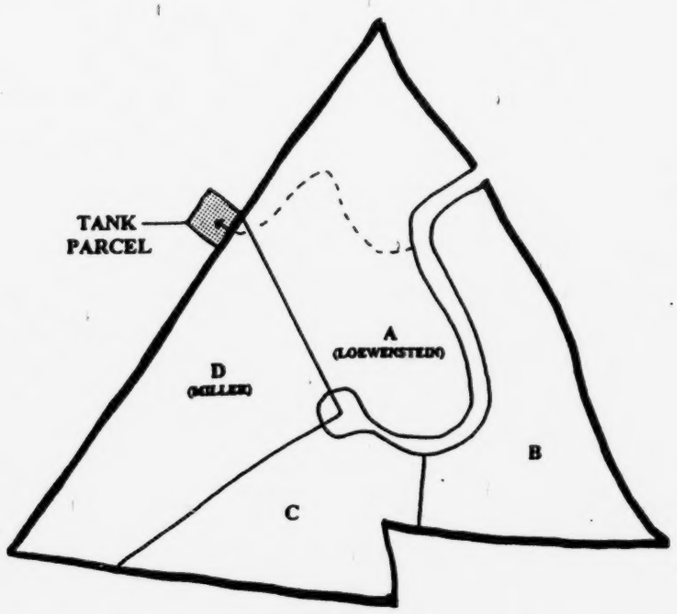

FIG 4: EASEMENT OPTION

1977 Subdivision Boundary
Lot Line
Possible Access Route
* Not to Scale

These drawings have been prepared for the convenience of the Court based on information in the record. See Trial Exhibits 9A, 16A, 16B.

MOTION FILED
JUL 14 2003

(3)

No. 02-1662

In the
Supreme Court of the United States

PETER J. LOEWENSTEIN and HELEN LOEWENSTEIN,

Petitioners,

v.

CITY OF LAFAYETTE, a Municipality,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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14 pp

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation respectfully moves this Court for permission to file the attached brief amicus curiae in support of Petitioners Peter J. and Helen Loewenstein. Written consent for amicus participation in this case was granted by counsel of record for Respondent City of Lafayette. Counsel for Petitioners did not respond to a request for written consent.

Pacific Legal Foundation (PLF), the largest and most experienced nonprofit public interest law foundation of its kind, has been litigating in support of the rights of individuals to make reasonable use of their private property for over 30 years. PLF attorneys have argued before this Court on several occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF has also participated as amicus curiae in nearly every major real property takings case heard by this Court in the last two decades, including the recent case of *Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 533 U.S. 948 (2001).

PLF believes that its litigation experience will provide an additional, valuable viewpoint on the issues presented in this case. Specifically, PLF seeks to augment the arguments of the Petitioners by clarifying just how far the decision below goes in isolating California from this Court's takings jurisprudence. PLF contends that the decision below is in direct conflict with this Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), as affirmed by *Tahoe-Sierra*. California takings jurisprudence denies compensation for the effective period of a regulation that is invalid and that therefore fails to advance

legitimate state interests. Essentially, the opinion of the California Court of Appeal demonstrates that temporary takings are nonexistent in California. PLF's amicus brief also seeks to direct this Court to lower court decisions, not cited by Petitioners, that are in conflict with the decision by the California Courts.

For the foregoing reasons, Amicus Pacific Legal Foundation respectfully requests that this Court GRANT its motion for leave to file the attached brief.

DATED: July, 2003.

Respectfully submitted,

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QUESTION PRESENTED

Whether a state court may avoid the duty, recognized by this Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987), to award just compensation for a temporary regulatory taking by characterizing the taking as a "normal delay" in the land use process?

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTRODUCTION[1]

This case confronts the Court with an understanding of federal constitutional law that redacts the doctrine of temporary regulatory takings in California, and in so doing directly flouts this Court's jurisprudence. Through litigation, the Loewensteins, owners of two small, adjacent parcels, established that the City of Lafayette illegally prevented them from obtaining a lot-line adjustment that would have allowed them to make economically beneficial use of their land. A trial court subsequently ruled that the City's actions caused a compensable permanent taking of that property, which prompted the City to grant the disputed lot-line adjustment.

Given the City's reversal, the California Court of Appeals concluded that the landowners retained only a temporary regulatory takings claim. But, relying on the California Supreme Court's decision in *Landgate, Inc. v. California Coastal Commission*, 17 Cal. 4th 1006 (1998), the court held that the Loewensteins could not obtain compensation for the temporary imposition of the land use restriction, even though the restriction was held by the trial court to amount to a permanent regulatory taking if left in place. *See Loewenstein v. City of Lafayette*, 103 Cal. App. 4th 718, 729 (2002). In the lower court's view, loss of use and value prior to and up to invalidation of the City's illegal action was merely the product of a "normal" and, thus, noncompensable "delay" in the development process.

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Under this understanding of the Just Compensation Clause, there is no meaningful compensatory remedy in California for temporary regulatory takings. This is, however, the very understanding that this Court rejected over fifteen years ago in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 322 (1987) (holding that "invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy"). This Court should not allow California to unilaterally turn back the constitutional clock for millions of property owners by ignoring the clear commands of the United States Supreme Court.

ARGUMENT

THE DECISION BELOW RAISES THE IMPORTANT QUESTION OF WHETHER A LOCAL GOVERNMENT MUST PAY JUST COMPENSATION FOR A TEMPORARY REGULATORY TAKING OF REAL PROPERTY WHEN THE REGULATORY ACTION IS RESCINDED AFTER A JUDICIAL DETERMINATION THAT IT CAUSED A PERMANENT TAKING OF THE PROPERTY

In *First English*, this Court held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *First English*, 482 U.S. at 321. In this way, *First English* adopted the principle that

> once a court finds that a police power regulation has effected a "taking," the government entity must pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 328 (2002) (quoting *San Diego Gas & Electric v. San Diego*, 450 U.S. 621, 658 (1981) (Brennan, J., dissenting). Recently, this Court engaged in an extensive review of *First English* and concluded that "nothing that we say today qualifies its holding." *Tahoe-Sierra*, 535 U.S. at 328.

The lower court has, however, qualified *First English*'s holding to such a degree that compensation for a temporary regulatory taking is logically the constitutional exception, rather than the rule. The vehicle for this regression is *First English*'s brief statement that it did "not deal with the quite different questions that would arise in *the case of normal delays* in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." *First English*, 482 U.S. at 321 (emphasis added).

Seizing upon this "normal delay" language, the court below concluded that the City's illegal land use decision could not give rise to a claim for compensation. *Loewenstein*, 103 Cal. App. 4th at 728-29. Central to this conclusion was the court's determination that the "*policy*" under which the City illegally acted was "legitimate." *Id.* at 732. More precisely, because a "reasonable policy" gave rise to the illegal land use restriction, the Loewensteins' loss of all use and value of the property amounted to a noncompensable "normal delay." *Id.* at 736 (resolution of the threshold issue of the legality of the lot-line adjustment was a normal delay in the process of obtaining a permit pertaining to land use).

The court did offer future temporary regulatory takings claimants one slim hope: if an illegal land use decision was guided by an improper motive, such as one made for "no purpose other than to delay the development project before it," compensation might be possible. *See Loewenstein,* 103 Cal. App. 4th at 728, 731, 734-36 ("there is no substantial evidence

to support the conclusion that the City's action was taken for any motive other than carrying out a substantial government interest"). There is nothing, however, in this Court's decisions that comes close to such a requirement. On the contrary, because "'the Constitution measures a taking of property not by what a State says, or by what it intends, but *by what it does*,'" *San Diego Gas & Electric*, 450 U.S. at 652-53 (Brennan, J., dissenting) (quoting *Hughes v. State of Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring)) (emphasis added),[2] the constitutional rule for temporary regulatory taking is simply that just compensation is required when the government goes so far as to cause a regulatory taking that "continue[s] for only a temporary period of time." *Eberle v. Dane County Board of Adjustment*, 595 N.W.2d 730, 737 (Wis. 1999), *accord Stelpflug v. Town Bd., Town of Waukesha, County of Waukesha*, 612 N.W.2d 700, 706 (2000) (following *Eberle* in holding that "temporary condemnation for a public road in this case was sufficient a deprivation of the incidents of ownership to constitute a taking").

First English's "normal delay" language hardly justifies a complete reversal of these principles, and thus the evisceration of *First English* itself. As *Tahoe-Sierra* affirmed, that language simply refers to governmental actions that do not rise to a taking in the first place; i.e., delays in "obtaining building permits, changes in zoning ordinances, variances, and the like." *Tahoe-Sierra*, 535 U.S. at 329. The narrow "normal delay" exception does not eliminate liability for a regulation *already*

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[2] This Court has refrained from looking closely at motive "when addressing whether compensation must be paid" because of the difficulties in discerning regulatory intent and because it "would demand that the Court develop a hierarchy of acceptable governmental motivations." Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. Cal. L. Rev. 1393, 1433 n.97 (1991).

found to cause a taking. When a regulatory taking is found to exist, and the regulatory action causing that taking is either judicially invalidated or rescinded by the government, a compensable temporary taking exists without further inquiry. *See Tahoe-Sierra*, 535 U.S. at 328. But, under the California rule, the court improperly reconsiders whether a taking has occured at all through use of an additional standard: Whether the illegal action was improperly motivated by a desire to delay development. This is the improper analysis that the court below conducted when it determined that the Loewensteins' right to just compensation was voided because the City had legitimate motivations for taking their property.

Under the lower court's decision, even a land use restriction that (1) denies all economically beneficial use of property and (2) is therefore judicially declared to cause a permanent taking if left in place will fall outside the window for temporary regulatory takings compensation. Indeed, if the lower court's rule is correct, many (if not all) of the state decisions that have awarded compensation for temporary regulatory takings since *First English* are wrong because there was no showing of illegitimate motive. *See, e.g.*, *Stelpflug*, 612 N.W.2d at 707-08 (compensation awarded for temporary period when land condemnation rescinded); *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401 (Neb. 1994) (invalidated denial of development permit gave rise to claim for compensation under rationale of *First English*).

Unfortunately, the decision below was not an aberration in California, but instead accurately represents views articulated by the California Supreme Court in *Landgate*. *See Loewenstein*, 103 Cal. App. 4th at 736 ("This case fits like a hand in a glove with the rule established by [the California Supreme Court in] *Landgate*.").[3] Thus, even as other state

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[3] Like the decision below, *Landgate* holds that there is no right

(continued...)

courts have severely criticized *Landgate*'s creative use of the "normal delay" language, *see, e.g., Eberle*, 595 N.W.2d at 742 n.25 ("the argument of the majority in *Landgate* was clearly considered and rejected by the United States Supreme Court"), California courts continue to aggressively apply it to deny compensation for even the most textbook temporary regulatory taking. *Accord Lambert v. City and County of San Francisco*, 120 S. Ct. 1549, 1551 (2000) (Scalia, J., dissenting from the denial of certiorari).

"The expansion of the normal delay [statement in *First English*] to include administrative appeals and prolonged litigation . . . seems totally unwarranted. Indeed, this expansion threatens to vitiate *First English*" and the constitutional right to just compensation. Steven J. Eagle, *Just Compensation for Permanent Takings of Temporal Interests*, 10 Fed. Cir. B.J. 485, 501 (2001). It is incumbent upon this Court to remind the states that, until this Court says otherwise, the Just Compensation Clause imposes monetary costs on unconstitutional applications of the government's land use discretion, regardless of whether the government persists with such an application or reverses course when confronted with the illegality of its actions. *See First English*, 482 U.S. at 321.

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[3] (...continued)
to compensation when a court invalidates an illegal government action that prevents all use of property during its effective period unless the underlying decision was "so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project." *See Landgate*, 17 Cal. 4th at 1024.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition.

DATED: July, 2003.

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